79-260

No.

Supreme Court, U. S.
FILED
AUG 16 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
PETITIONER

v.

STATE OF IDAHO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATE OF IDAHO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Secretary of the Interior, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a) is not yet reported. The opinion of the district court (App. B, *infra*, 2a-29a) is reported at 417 F. Supp. 873. The opinion of the Interior Board of Land Appeals (App. C, *infra*, 30a-38a) is reported at 21 IBLA 210.

JURISDICTION

The judgment of the court of appeals (App. E, *infra*, 43a) was entered on April 19, 1979. Mr. Justice Stevens subsequently entered an order enlarging the time in which to petition for certiorari to August 17, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Carey Act, as amended, 43 U.S.C. 641, requires the Secretary of the Interior indefinitely to reserve from appropriation to other public or private uses some 2.4 million acres of desert land within Idaho for the eventuality that the State may be able and willing to select all or any part of such acreage for irrigation and reclamation under the Act.

STATUTES INVOLVED

The Carey Act of August 18, 1894, ch. 301, Section 4, 28 Stat. 422, 43 U.S.C. 641, provides:

> To aid the public-land States in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior with the approval of the President is, as of August 18, 1894, authorized and empowered, upon proper application of the State to contract and agree, from time to time, with each of the States in which there may be situated desert lands as defined by the Act approved March 3, 1877, and the Act amendatory thereof, approved

> March 3, 1891, binding the United States to donate, grant and patent to the State free of cost for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed, occupied, and not less than twenty acres of each one hundred and sixty acre tract cultivated by actual settlers, as thoroughly as is required of citizens who may enter under the desert-land law, within ten years from the date of approval by the Secretary of the Interior of the State's application for the segregation of such lands; and if actual construction of reclamation works is not begun within three years after the segregation of the lands or within such further period not exceeding three years, as shall be allowed by the Secretary of the Interior, the said Secretary of the Interior, in his discretion, may restore such lands to the public domain; and if the State fails, within ten years from the date of such segregation, to cause the whole or any part of the lands so segregated to be so irrigated and reclaimed, the Secretary of the Interior may, in his discretion, continue said segregation for a period not exceeding five years, or may, in his discretion, restore such lands not irrigated and reclaimed to the public domain upon the expiration of the ten-year period or of any extension thereof.
>
> Before the application of any State is allowed or any contract or agreement is executed or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the said land proposed to be irrigated which shall exhibit a plan showing the mode of the contemplated

irrigation and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops and shall also show the source of the water to be used for irrigation and reclamation.

Any State contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section; but the State shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation, and settlement.

As fast as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed, and occupied by actual settlers, patents shall be issued to the State or its assigns for said lands so reclaimed and settled: *Provided*, That said States shall not sell or dispose of more than one hundred and sixty acres of said lands to any one person, and any surplus of money derived by any State from the sale of said lands in excess of the cost of their reclamation, shall be held as a trust fund for and be applied to the reclamation of other desert lands in such State.

The Act of March 15, 1910, ch. 96, 36 Stat. 237, 43 U.S.C. (1970 ed.) 643, provides: [1]

[1] This statute was repealed by Section 704(a) of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743, 2792.

To aid in carrying out the purposes of section 641 of this title, it shall be lawful for the Secretary of the Interior, upon application by the proper officer of any State or Territory to which said section applies, to withdraw temporarily from settlement or entry areas embracing lands for which the State or Territory proposes to make application under said section, pending the investigation and survey preliminary to the filing of the maps and plats and application for segregation by the State or Territory: *Provided*, That if the State or Territory shall not present its application for segregation and maps and plats within one year after such temporary withdrawal the lands so withdrawn shall be restored to entry as though such withdrawal had not been made.

STATEMENT

1. The Carey Act, Section 4 of the Act of August 18, 1894, ch. 301, 28 Stat. 422, 43 U.S.C. 641, authorizes the Secretary of the Interior, with the approval of the President, to contract to grant and patent "desert lands" to any state in which there are such lands, in exchange for the state's agreement, among other things, to cause such lands to be irrigated, reclaimed, cultivated, and settled.[2] After a state's application for a grant has been approved, the land is segregated from the public domain for a period of from three to 15 years for the pur-

[2] "Desert land" is land which will not yield an agricultural crop without irrigation. See 43 U.S.C. 322, 641 (para. 1).

pose of allowing the state to cause an adequate irrigation system to be constructed and a sufficient water supply to be made available. Upon satisfactory proof that the conditions of the contract have been fulfilled, patents must be issued to the state or its assigns for the land reclaimed and settled. Originally, no state could receive more than one million acres of land for Carey Act development. In 1908, however, Congress raised the ceiling for Idaho to three million acres. See Act of May 27, 1908, ch. 200, Section 1, 35 Stat. 347, 43 U.S.C. 645; Pub. Res. 28, 35 Stat. 577; see generally 42 Fed. Reg. 18100 (1977) (Carey Act regulations).

In 1910, the Secretary was authorized to withdraw desert lands temporarily from the public domain upon request by a state but prior to its submission of a formal plan under the Carey Act. Act of March 15, 1910, ch. 96, 36 Stat. 237, 43 U.S.C. (1970 ed.) 643.[3] This legislation was added to prevent speculative filings on land contemplated by a state for a Carey Act project. S. Rep. No. 367, 61st Cong., 2d Sess. 1 (1910); H.R. Rep. No. 662, 61st Cong., 2d Sess. 1 (1910).

No state has reached its ceiling of land permitted under the Act. To date, Idaho has received approximately 600,000 acres of land under the Act. See

[3] After the district court's decision and judgment, this provision was repealed by Section 704(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, 90 Stat. 2792. Section 204 of FLPMA, 43 U.S.C. 1714, however, gave the Secretary general authority to make withdrawals.

Report of the Director of the Bureau of Land Management Table 114 (1952) (the most current report on the Carey Act). Most patents under the Carey Act were issued in the early years of this century when water sources were still conveniently located to arid land. As water sources become increasingly unavailable to arid lands, new Carey Act projects began to dwindle and by 1952 were all but nonexistent. Recent improvements in technology for pumping water from deep wells and river canyons, however, have revived interest in Carey Act developments in Idaho.[4]

2. In 1974, the State of Idaho, invoking Section 643, requested that the Secretary withdraw temporarily a specified tract of 27,400 acres in Idaho pending the State's submission of a proposed development under Section 641. On January 24, 1975, the Bureau of Land Management rejected the application for a temporary withdrawal because the land had been withdrawn for other purposes including, as to some of the land, stock-driveway purposes (App. C, *infra*, 31a, 33a).[5] The State appealed BLM's action to

[4] We are informed that the State of Nevada has received a large number of applications from Nevada residents requesting Carey Act developments. The State, in turn, is expected to soon make applications to the Secretary under the Carey Act.

[5] Under the authority of 43 U.S.C. (1970 ed.) 141; Exec. Order No. 10355, 17 Fed. Reg. 4831 (1952), the Secretary withdrew the lands in 1955 for driveways for stock. See Act of December 29, 1916, ch. 9, 39 Stat. 865, 43 U.S.C. (1970 ed.) 300, repealed and replaced by the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, Sections 204, 704(a), 90 Stat. 2792, 43 U.S.C. 1714; 43 C.F.R. 2313.1(c) (stock driveways).

the Interior Board of Lands Appeals only with respect to the lands withdrawn for stock-driveway purposes (*id.* at 33a). The State simultaneously petitioned the Board, pursuant to Section 7 of the Taylor Grazing Act, 43 U.S.C. 315f, to classify the tract as suitable for development under the Carey Act (*id.* at 34a).

The State argued that the Carey Act gave Idaho the right to three million acres of public land for Carey Act developments and that this right vested in 1894 when the Act became law and takes precedence over subsequent withdrawals and uses (*id.* at 36a). Accordingly, the State contended that the Secretary has no discretion under Section 643 to deny Idaho's request so long as the lands requested were desert lands (*ibid.*). On July 31, 1975, however, the Board held that Section 641 "is couched in discretionary language authorizing and empowering—not requiring—the Secretary to contract and agree with the states to donate, grant, and patent lands" (*ibid.*). The Board affirmed the refusal to withdraw the lands and directed the petition for classification to the BLM for initial consideration (*id.* at 38a).

3. On February 21, 1975, the State filed the present action in the United States District Court for the District of Idaho against the Secretary of the Interior. The complaint alleged that the Secretary had notified the State (i) that he would not allow "requests for segregation or withdrawal under the Carey Act as a matter of right" and (ii) that he had the authority to refuse to convey lands under the Carey Act even though they are in fact desert lands

and suitable for agricultural use (Compl. at 2). The complaint sought a declaratory judgment that the Secretary's policy violated the Carey Act.[6]

On summary judgment the district court agreed with the Secretary that the Carey Act did not make a grant in praesenti to the State, and that the State did not have an unbridled right to select any desert land for Carey Act development (App. B, *infra*, 18a). The court also held that if the State is denied an application for land for Carey Act development because that land has been withdrawn for some other use, the State's remedy is to petition the Secretary to open that land for Carey Act development, and that the Secretary's decision, once final, is reviewable in the courts (*id.* at 19a). The court, however, accepted Idaho's basic claim, holding that the Carey Act "conferred upon the State of Idaho a right of entitlement to three million acres of desert land suitable for irrigation, cultivation and settlement" and that the Secretary must preserve enough desert land to satisfy this right (*id.* at 18a-19a):

> The State is guaranteed a maximum entitlement of three million acres of suitable desert land for Carey Act development to select from time to time, which it cannot be deprived of by the Secretary of the Interior, if the State meets the conditions of the Carey Act. However, the State

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[6] The complaint also alleged that another policy of the Secretary concerning the amount of acreage available to a family violated the Act (Compl. at 3-4). The courts below decided this issue against the Secretary. We do not seek certiorari on this issue.

> may not perfunctorily select acreage previously withdrawn for other purposes such as in this case a withdrawal for stock-driveways. *The Secretary is under an obligation to preserve enough desert land suitable for Carey Act development to fulfill the State's right of entitlement, which the Federal Government must contract to donate to the State in accordance with the Act.* [Emphasis added.]

The court entered a judgment against the Secretary that "ordered, adjudged and declared" that Idaho "is entitled to have withdrawn and patented three million acres of the desert lands in the public domain (as reduced by prior patents issued pursuant to the Carey Act) situate in the State of Idaho for entry under said Act, providing that there are sufficient lands of such kind, quality and character within the State of Idaho, and providing that the State of Idaho satisfies all the terms and conditions of said Act * * *" (App. D, *infra*, 40a). The Secretary and the State both appealed. On April 19, 1979, the Ninth Circuit affirmed in a one-sentence opinion (App. A, *infra*, 1a).

REASONS FOR GRANTING THE PETITION

1. The decision below is incorrect. The Carey Act merely authorizes the Secretary of the Interior, in his discretion and subject to the approval of the President, to enter into contracts to grant land to the states: the Act does not require the Secretary and the President to grant the maximum acreage authorized to each state. The text of the statute, its legislative history, and consistent administrative practice, all support this conclusion.

a. First, the language of the statute is permissive—not mandatory. The Secretary is "authorized and empowered" to contract to grant desert land to the state when certain conditions are fulfilled. It does not follow that where the conditions are met the Secretary *must* make the grant. To "authorize" administrative action is not to require that it be taken. See, *e.g.*, *Jay* v. *Boyd*, 351 U.S. 345 (1956); *INS* v. *Bagamasbad*, 429 U.S. 24, 26 (1976).

This is all the clearer here because Congress in the same breath used the word "binding" to describe the contract. Congress clearly intended the contract, once made, to be binding, but, equally clearly, gave the Secretary discretion whether or not to enter into such a contract in the first place. The Secretary, moreover, may grant "not exceeding" three million acres to the state. Had Congress intended to confer an inchoate right to three million acres, subject only to the availability of "suitable" land and irrigation, cultivation and settlement of the land, the phrase "not exceeding" would have no place. "Not exceeding" reflects the discretion to grant less than three million acres even where the statutory conditions are met.

Furthermore, the President must "approve" all contracts under the Act. No criteria, however, are specified to guide the President. Inasmuch as it is unlikely that the President's approval was required simply to confirm the Secretary's factual determination that the statutory requirements are met, the pro-

vision for the President's concurrence must have been intended to insure that, considering all relevant factors of public policy, release of the land was in the public interest.

There is still another textual pointer. Even when a binding contract is made, the Secretary may "in his discretion" restore segregated land to the public domain if actual construction of reclamation works is not begun within three years of the segregation. This power is inconsistent with any "right" of the state to the land upon its mere say-so that it intends to develop it.

The plain language of the statute thus defeats any right of Idaho to take up to three million acres of suitable public land. Certainly, there is nothing in the Carey Act that overcomes the presumption against statutory grants of the public domain. See *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 617 (1978).

b. The legislative history of the Carey Act is entirely consistent with the indications of the text. Two proposals were considered. The Senate bill would have "reserved" outright one million acres for each state, to be selected by the state within ten years of the bill's passage. See 26 Cong. Rec. 8388 (1894). This bill was not enacted. The House proposal, which eventually became the law, made no grant at all. As Representative McRae, its sponsor, observed when the House proposal was being considered on the floor as a substitute for the Senate bill (26 Cong. Rec. 8391):

> Now, Mr. Speaker, I want to state briefly what I understand to be the main difference be-

tween the two propositions. The Senate proposition makes a reservation outright for the States and will make it possible for the States to put a million of acres in each State in reservation for an indefinite period. It leaves the question of irrigation to be determined under rules and regulations to be made by the States themselves. In short, the States will decide whether they have complied with the conditions as to irrigation. The pending proposition does not make any grant, but only authorizes the Secretary of the Interior with the approval of the President to make a contract with any States in which any of these lands may be situated for the reclamation of not exceeding a million acres in each State, the question of irrigation to be finally determined by the Executive officers of this Government. No reservation or withdrawal is permitted except for temporary purposes until the plan is approved; and no title is to pass until thorough irrigation is accomplished and shown to the satisfaction of the Interior Department.

In sum, the Carey Act was simply intended to authorize the Secretary to make such grants and thus enlarges the menu of uses available for public land use management.[7] The Secretary is free, so far as the Carey Act is concerned, to devote public lands

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[7] Arguably, a refusal by the Secretary to classify lands for Carey Act development is final agency action reviewable under the Administrative Procedure Act, 5 U.S.C. 704. But see *Bronken* v. *Morton*, 473 F.2d 790, 795 (9th Cir.), cert. denied, 414 U.S. 828 (1973). At most, however, such a refusal could be set aside only if it were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A).

to wholly different uses. The courts below thus erred in holding that the State was absolutely entitled, one way or another, to three million acres of land for Carey Act projects and the Secretary is obliged to preserve enough desert land for such developments in each state.[8]

c. Finally, the long standing and consistent administrative interpretation of the Act by the Secretary of the Interior has been that federal acceptance of a state development contract under the Act is "wholly within the discretion of the Department":

> It is clear from the terms of the act of August 18, 1894, * * * that the acceptance of the offer of the State is a matter wholly within the discretion of the Department. The filing of the application is preliminary to the formation of a contract between the State and the United States. It is manifest that the formation of such contract depends upon the acquiescence of both parties thereto without a right in either to insist upon a proffer or acceptance by the other.

State of Wyoming, 36 Pub. Lands Dec. 399 (1908). Accord, *Yakima Development Co.* v. *State of Washington*, 34 Pub. Lands Dec. 453, 455-456 (1906).

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[8] The court did not offer any specific basis for its conclusion that the Secretary is obliged to preserve enough land in each state for Carey Act development. The court evidently placed some reliance on this Court's statement in *Idaho Irrigation Co.* v. *Gooding*, 265 U.S. 518, 521 (1924), that "[b]y the Carey Act the United States *binds itself* to donate" desert lands to states. This was not even a dictum and was simply part of a brief statement of the background of *Gooding*. The Court in *Gooding* plainly did not intend to address the issue presented by our petition.

This construction—which has never previously been questioned in any litigation—by the agency charged with the principal responsibility for "regulating the acquisition of rights in the public lands" is entitled to considerable deference. *Andrus* v. *Charlestone Stone Products Co.*, *supra*, 436 U.S. at 613-614; *Udall* v. *Tallman*, 380 U.S. 1, 18 (1965); *Cameron* v. *United States*, 252 U.S. 450, 460 (1920). Significantly, when Congress amended the Act several times after the Interior Department decisions cited above were issued, it did not disapprove of Interior's interpretation. We may conclude that the Secretary was not violating his statutory mandate. See, *e.g.*, *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974); *Board of Governors* v. *First Lincolnwood Corp.*, No. 77-832 (Dec. 11, 1978), slip op. 13; *United States* v. *Rutherford*, No. 78-605 (June 18, 1979), slip op. 8-9.

2. The decision below will have a severe impact on the Secretary's management of public lands. Idaho has thus far used only .6 million acres of its three-million acre allotment. The decision below—indeed, judgment itself—requires the Secretary to insure that at least 2.4 million acres of arid land "suitable" for Carey Act development will remain available in Idaho. This places an intolerable "freeze" on the public domain, and imposes a severe administrative burden on the Department of the Interior.

To comply with the judgment below, the Secretary must undertake a special inventory of the public lands in Idaho to determine the extent to which 2.4 million acres of "suitable" character are available

and to identify and to preserve such land for future Carey Act projects. Whether an area is "suitable" depends on soil quality and whether it can ever be supplied with water. Making such determination necessarily depends largely on speculation concerning future developments in locating underground sources of water that may be tapped with available and future technology. Because such speculation will doubtlessly involve gross error, much of the land set aside may never actually be claimed under the Act.

In the meantime, the Secretary will be prevented from putting the land to what he believes are higher uses inconsistent with Carey Act development. For example, the Secretary has received 1,400 pending applications under the Desert Land Act, 43 U.S.C. 321, which permits an individual to purchase up to 320 acres of "desert land" for $1.25 per acre on the condition that he irrigate and cultivate it. See Boise District Agricultural Development Draft Environmental Impact Statement for Southwest Idaho, Bureau of Land Management, Boise District Office at 1-1 through 1-2 (1979) (which discusses these and other uses of federal land in Idaho). These applications must be denied to the extent that granting them would defeat the State's "entitlement" under the decision below.

Similarly, under Section 203(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1713(b), the Secretary is authorized to convey desert land of agricultural value "either under the sale authority of this section or in accordance with other

existing law." If the decision below stands, this option would be drawn into doubt for vast stretches of public lands, since the land might be needed to satisfy the State's Carey Act rights.[9] Indeed, all other uses of the land inconsistent with Carey Act development would be foreclosed—all in frustration of the goals of FLPMA, which directs the Secretary to develop land use plans for all public lands in order to insure that they are wisely used. 43 U.S.C. 1701(a)(1), 1712.

Nor is Idaho the only state where such problems are presented. In public-land states other than Idaho, an additional twelve million acres was authorized for Carey Act development. Of this total, only approximately .5 million acres have been patented under the Act. Report of the Director of the Bureau of Land Management, Statistical Appendix, Table 114 (1952). If the decision below is followed, the Secretary will be required to identify and set aside approximately 11.5 million acres of desert land "suitable" for Carey Act development in these states.[10]

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[9] Even if more than 2.4 million acres of such desert land exist in the public domain in Idaho, it is apparent that as the land is disposed of, or put to uses inconsistent with Carey Act development, eventually the amount available for development under the Act will be reduced below the State's entitlement, again preventing the Secretary from properly administering the remaining land.

[10] There is no conflict between the decision below and any decision of any other circuit. All of the land affected by the decision, however, lies principally within the Ninth Circuit and all of it lies in either the Eighth, Ninth or Tenth Circuit. No other litigation concerning the Carey Act is expected in

And those 11.5 million acres also must be closed to all other uses.

Of course, these consequences must be borne if the law requires it. But we may doubt whether it was intended that the states embraced by the Carey Act, having already had eighty-five years to take advantage of the statute, are now free to require that several million acres be identified and set aside indefinitely, so that, if and when they choose, those states may, however belatedly, complete selections. In our submission, no such purpose reasonably can be imputed to the Congress of 1894.

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the Eighth or Tenth Circuit in the foreseeable future. Accordingly, to wait until a conflict develops before reviewing the issue would impose an unnecessary and harsh waiting period of federal land management practices in Idaho and the rest of the Ninth Circuit. The question presented is of substantial importance notwithstanding the absence of a conflict.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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AUGUST 1979

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 77-1300, 77-1517

STATE OF IDAHO ET AL., PLAINTIFFS-APPELLANTS

v.

CECIL D. ANDRUS,* Secretary of the Interior, DEFENDANT-APPELLEE

April 19, 1979

Appeal from the United States District Court for the District of Idaho.

Before ELY and KILKENNY, Circuit judges, and FERGUSON,** District Judge.

PER CURIAM:

Upon the basis of the carefully written opinion of Judge Anderson, reported at 417 F.Supp. 873 (1976), the judgment of the District Court is

AFFIRMED

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* Mr. Andrus is now the Secretary of the Interior. He has been substituted for the original appellee, a then party in his official capacity. Rule 43(c) Fed.R.App.P.

** Honorable Warren J. Ferguson, United States District Judge, Central District of California, sitting by designation.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1-75-22

STATE OF IDAHO, ex rel. CECIL D. ANDRUS, Governor; R. KEITH HIGGINSON, Director, IDAHO DEPARTMENT OF WATER RESOURCES; AND THE IDAHO WATER RESOURCE BOARD, PLAINTIFFS

vs.

THOMAS S. KLEPPE, Secretary of the Interior,
DEFENDANT

MEMORANDUM DECISION AND ORDER

On August 18, 1894, the Carey Act was passed "granting," under certain conditions, one million acres of desert land to the State of Idaho, as well as other desert land states. 43 U.S.C.A. 641. An additional two million acres were "granted" the State of Idaho in 1908. 35 Stat. 577 (May 25, 1908) and 35 Stat. 347, 43 U.S.C.A. 645 (May 27, 1908). On February 21, 1975, the State of Idaho, ex rel. Cecil D. Andrus, Governor, R. Keith Higginson, Director of the Idaho Department of Water Resources, and the Idaho Water Resource Board filed suit against the United States Secretary of the Interior, alleging jurisdiction under the federal question jurisdictional statute, 28 U.S.C.A. 1331 and under the Administrative Procedure Act, 5 U.S.C.A. 701. On Septem-

ber 24, 1975, the Idaho Carey Act Development Association was granted leave to appear in this case as amicus curiae.

Both plaintiff and defendant have filed motions for summary judgment, supported by legal memoranda. The Idaho Carey Act Association has likewise filed memoranda. A hearing was held April 30, 1976, in which all issues before the Court were addressed. The case is submitted and the Court is fully advised in the premises and hereinafter renders its Memorandum Decision and Order incorporating its Findings of Fact and Conclusions of Law.[1]

On July 31, 1975, the Interior Board of Land Appeals rendered its decision affirming a denial of an application by the Idaho Department of Water Resources for a temporary withdrawal pursuant to 43 U.S.C.A. 643. *Idaho Department of Water Resources*, 21 IBLA 210 (1975). The Board rejected the application on the ground that the lands applied for had previously been withdrawn for stock-driveway purposes.[2]

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[1] There are no material issues of fact in dispute; rather, the parties have sought to clearly present issues of law to the Court. As such, it is appropriate to decide this case on the basis of cross-motions for summary judgment. Rule 56, F. R. Civ. P.

[2] The Idaho Department of Water Resources had also applied for land previously withdrawn for reclamation purposes and for a National Wildlife Refuge. The Department, however, did not appeal the ruling with regard to land covered by such withdrawals; rather, the plaintiff has only attacked the ruling pertaining to stock-driveway withdrawals. It is noted,

Plaintiff's first cause of action prays for judgment declaring that the State of Idaho has an absolute right to demand up to three million acres of desert lands under the Carey Act and further declaring that the defendant, through the Bureau of Land Management, has no authority or discretion to deny any request for segregation or withdrawal when presented by the plaintiff. The amicus plaintiffs contend there are two issues involved in plaintiff's first cause of action, namely: (1) whether the State of Idaho has the right under the Carey Act to request withdrawal or segregation of lands which have been previously withdrawn from the public domain or reclassified by action of the federal executive authority, and (2) whether the defendant has the right to withdraw lands from the purview and effect of the Carey Act *after* the State of Idaho has identified such lands as desert lands, selected them, and requested their segregation. *See, Wyoming* v. *United States*, 255 U.S. 489, 41 S. Ct. 393, 65 L. Ed. 742 (1921). The plaintiff and amicus curiae have attempted to present a very broad issue to the Court; however, this Court can decide only actual cases and controversies.[3] To that end the second issue stated

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nonetheles, that plaintiff's argument addresses the nature of the grant and goes much farther than a mere attack on previous withdrawals for stock-driveway purposes. Plaintiff attacks any type of previous withdrawal, save on—a withdrawal for national security or defense.

[3] The controversy must be one that is appropriate for judicial determination, it must be definite and concrete, touching the legal relation of the parties having adverse legal

above and raised by the amicus curiae is not properly before the Court. While the amicus curiae contend there are instances where Carey Act requests have been denied on the basis of prior and subsequent withdrawals, nevertheless, the only final agency action before the Court, as correctly pointed out by the United States, is the decision in *Idaho Department of Water Resources, supra*. 5 U.S.C.A. 704.

I.

The issue, therefore, is whether the defendant, Secretary of the Interior, through his representative, has discretion and authority to deny a State request for temporary withdrawal of desert lands on the ground that the lands were previously withdrawn

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interests, and it must be real and substantial, admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 57 S. Ct. 461, 81 L. Ed. 617 (1937). A declaration of rights as they stand must be sought, not on rights which may arise in the future and there must be an actual controversy over an issue, not a desire for an abstract declaration of law. *Re Summers*, 325 U.S. 561, 65 S. Ct. 1307, 89 L. Ed. 1795 (1945). There is no actual case or controversy before this Court with respect to denials of Carey Act applications on the ground of subsequent withdrawal or reclassification. The factual matters involved in such denials by the Secretary of the Interior or the reasoning employed to reach the result are not known. Further, even if this Court could hold there was such a case before it, the issue does not arise in a proper framework, since it does not appear that administrative remedies have been exhausted. 5 U.S.C.A. 704. *See Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S. Ct. 459, 82 L. Ed. 638 (1938).

for stock-driveway purposes. Resolution of the issue necessarily entails examining the nature of the grant to the States under the Carey Act. In construing a statute, the goal, of course, is to determine the legislative intent. Initially, the first inquiry must be the wording itself. The Carey Act states in relevant part:

> "To aid the public-land States in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior with the approval of the President is, as of August 18, 1894, *authorized and empowered, upon proper application* of the State *to contract and agree,* from time to time, with each of the States in which there may be situated desert lands . . ., *binding the United States to donate, grant and patent* to the State free of costs for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed, occupied, and not less than twenty acres of each one hundred and sixty acre tract cultivated by actual settlers, as thoroughly as is required of citizens who may enter under the said desert-land law, within ten years from the date of approval by the Secretary of the Interior of the State's application for the segregation of such lands; . . .
>
> ". . . and the Secretary of the Interior may make necessary regulations for the reservation of the lands applied for by the States to date from the date of the filing of the map and plan of irrigation, but such reservation shall be of no force

> whatever if such map and plan of irrigation shall not be approved.
>
> "Any State *contracting* under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section; . . .
>
> "As fast as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the State or its assigns for said lands so reclaimed and settled: . . ." (Emphasis added)

The wording of the statute seems quite clear and it is readily apparent that an *in praesenti* grant was not made to the States. Rather, the Act confers upon the States a right to contract with the United States under certain prescribed conditions in order to receive patents for acreages of the public domain. The purpose of the Act, as stated in the first paragraph, is to aid public-land States in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts. The same paragraph speaks in terms of binding the United States to donate, grant and patent to the State. However, the so-called binding donation is preceded, and modified by language which authorizes and empowers the Secretary of the Interior, upon proper application of the State, to contract and agree, from time to time, and

approve applications for segregation. The power to contract is the power to bind the United States to donate and patent in accordance with a contract, where the conditions of such contract have been fulfilled.

The Supreme Court, in *Idaho Irrigation Co.* v. *Gooding*, 265 U.S. 518, 44 S. Ct. 618, 68 L. Ed. 1157 (1924) (dicta) spoke of the grant as follows:

> "By the Carey Act the United States binds itself to donate, grant and patent to a state, complying with stated conditions, desert lands, which the state may cause to be irrigated, reclaimed, and occupied. The state is required to file a map of the land proposed to be irrigated, showing the plan of irrigation, etc., and is authorized to make contracts to cause the lands to be reclaimed, and to induce their settlement and cultivation. *Upon satisfactory proof the Secretary of the Interior is directed to issue patents to the state or its assigns.*" 265 U.S. at 521. (emphasis added)

In *Twin Falls Salmon River Land & Water Co.* v. *Alexander*, 260 Fed. 270 (D. C. Idaho 1919), *affirmed*, 267 Fed. 382 (9th Cir. 1920), Judge Dietrich, speaking for this Court, in dicta stated:

> "The primary purpose of the Carey Act was, not to enable the government to divest itself of title to its desert lands, but to secure their irrigation and reclamation; reclamation is the only consideration for the donation or grant, and *is a condition precedent to the exercise of the power to grant.* The authority conferred upon the Secretary of the Interior to convey is expressly lim-

> ited to desert lands, which the state shall have caused to be—
>
> 'irrigated, reclaimed, occupied, and not less than twenty acres of each hundred and sixty acre tract cultivated by actual settlers . . . as thoroughly as is required of citizens who may enter under the [said] desert land law.'
>
> The Act prescribes a procedure (similar to that required in the case of a desert land entry) for the temporary withdrawal of the lands from private entry, but the preliminary approval of the project by the *Secretary in nowise imposes upon him or implies an obligation to patent. The only purpose of the preliminary showing is to inform him whether the plan is of sufficient apparent merit to warrant a temporary withdrawal of the lands from other forms of entry.*" 260 F. at 274-275.[4] (Emphasis added)

The Eighth Circuit Court of Appeals in *McKinney* v. *Big Horn Basin Development Co.*, 167 Fed. 770 (8th Cir. 1909) also addressed the nature of the grant as follows:

> "The underlying purpose of the Acts of Congress in ceding the vast domain of desert lands within the territorial limits of the given state was, through the agency of the state government more immediately concerned, to speedily have them reclaimed from an unproductive waste by means

[4] The language addressing other forms of entry, while dicta, indicates Judge Dietrich's view that the Secretary of the Interior does indeed have the discretion to deny a request for temporary withdrawal where the land is best withdrawn for other types of uses, and withdrawals therefor.

of artificial irrigation, whereby they might become susceptible of human sustentation, bringing population and wealth to the state. *But Congress did not make the grant to the state of such lands in mass to take effect in praesenti.* The state was first to furnish satisfactory evidence to the Secretary of the Interior that the lands are irrigated, reclaimed, and occupied by actual settlers before any patent therefor should issue. It also imposed the condition that the state should not accord to any one person over 160 acres of said lands." 167 Fed. at 775 (Emphasis added)

The language in *McKinney* v. *Big Horn Basin Development Co.* and *Twin Falls Salmon River & Water Co.* v. *Alexander* reflect a view consistent with the language of the Act and can be read to state that an outright grant did not occur under the Carey Act.[5]

The legislative history of debate on the Carey Act reflects a position by the representatives that it

[5] The language quoted from the above cases is ditca and for that reason is not controlling. Notwithstanding the overbroad language in *Idaho Irrigation Co.* v. *Gooding*, an *in praesenti* grant of title did not occur under the Carey Act; rather, in 1894, as this opinion further develops, the States were given a right of entitlement to contract with the Secretary of the Interior for one million acres of desert land suitable for irrigation, cultivation and settlement. The cases cited, however, do offer some insight with regard to the nature of the grant, and the thoughts expressed by Judge Dietrich in *Twin Falls Salmon River Land & Water Co.* v. *Alexander* are in accord with the language of the Act itself and the legislative history.

was not to be an absolute gift as occurred under the Swamp Land Act of 1850. *United States* v. *Louisiana*, 127 U.S. 182, 8 St. Ct. 1047, 32 L. Ed. 66 (1888). A letter from S. W. Lamoreux, Commissioner, Office of the Secretary of the Interior, was introduced in the House and indicates the type of grant anticipated under the Carey Act. The letter, in part, states:

> "The people of the States in which the arid lands are located would like to see the United States undertake their reclamation. This is certainly impracticable now, and it is doubtful whether it will ever be otherwise. There are those who think that the arid lands should be given to the States under certain restrictions. Public sentiment would scarcely justify such legislation at this time. The experience of the United States and the several States under the swamp-land acts does not argue in favor of such disposal of the arid lands . . ."
>
> * * * * *
>
> "The principal proposition involved, reclamation and settlement by individuals in small holdings, meets my strong approval, and this bill seems to me to present full opportunity for the practical experiment and under proper safeguards. The United States retains title until reclamation is accomplished and the land occupied by actual settlers. This, if successful, is the great object to be attained; and if unsuccessful the United States still holds the unincumbered fee." 26 Cong. Rec. 8390 (1894).

The following passages from the Congressional Record amplify the nature of the grant from the viewpoints of a supporter of the House bill, as well as opponents of the same:

> "Mr. PICKLER. . . . The proposition that is now before the House is one that has been approved by the Commissioner of the General Land Office and I think there can be no objection to it. Gentlemen will remember how sensitive this House has shown itself from time to time in regard to making direct appropriations for the irrigation and reclamation of arid lands. Now, here is a proposition which costs the Government nothing, but simply donates these lands to the States, leaving them to bear the burden of irrigation and reclamation of arid lands. Furthermore, it is provided that the title to these lands shall not pass to the States until it is shown to the satisfaction of the Secretary of the Interior that the lands have been reclaimed according to law and the money expended upon them." 26 Cong. Rec. 8391

* * * * *

"Mr. McRAE. Mr. Speaker, as I have already stated, I do not approve of legislating in this way. . . .

"At the suggestion of the conferees on the part of the House, this substitute for the Senate proposition was prepared, because they were not satisfied with that of the Senate. If anything is to be done at this time it should be carefully guarded so as to protect the United States against fraud in the proof of reclamation.

"Now, Mr. Speaker, I want to state briefly what I understand to be the main difference between the two propositions. The Senate proposition makes a reservation outright for the States and will make it possible for the States to put a million of acres in each State in reservation for an indefinite period. It leaves the question of irrigation to be determined under rules and regulations to be made by the States themselves. In short, the States will decide whether they have complied with the conditions as to irrigation. The pending proposition does not make any grant, but only authorizes the Secretary of the Interior with the approval of the President to make a contract with any States in which any of these lands may be situated for the reclamation of not exceeding a million acres in each State, the question of irrigation to be finally determined by the Executive officers of this Government. No reservation or withdrawal is permitted except for temporary purposes until the plan is approved; and no title is to pass until thorough irrigation is accomplished and shown to the satisfaction of the Interior Department." Id.

* * * * *

"Mr. McRAE. If this substitute be adopted it will only authorize contracts which will lapse in ten years after their date. It is not a legislative grant; it does not require any action of Congress for its forfeiture. It does not even put the land in a state of reservation until a map is filed and the plan of irrigation is approved." Id.

* * * * *

"Mr. CANNON of Illinois. Mr. Speaker, it is with very much diffidence that I take the floor to

say anything about the Senate Amendment or the proposed substitute to this bill. . . . I want to express a doubt, however, about the wisdom of legislation of this kind upon the sundry civil or any other appropriation bill.

* * * * *

"But I very much doubt whether the proposed provision will bear good fruit. I recollect—I do not recollect, but all of us know—that in 1850 there was a grant of swamp land to the various States—Minnesota, Illinois, Arkansas, and all of the States that had public lands of that character. The question presented then was to get rid of the water in certain sections. This is a proposition to supply the water in certain other sections.

"Now, I must say that the operations of the swamp-land grant act was not satisfactory. Great lots of land were selected, for instance, in my own State of Illinois, the most valuable agricultural lands we have now, and great claims of indemnity are still pending in some of the States, so that that appropriation of land in the main was worse than wasted—not properly considered, not properly guarded." Id. at 8392.

* * * * *

"Mr. PICKLER. Mr. Speaker, I desire to say, in reply to the gentleman from Illinois, that for probably ten or twelve years this matter of irrigation in the arid regions has been before Congress, has been discussed, has been talked about, and we have so far failed to get any legislation in regard to the matter—an utter failure in any legislation. Now, this subject is well understood by the House of Representatives. Everybody knows that the land is lying out there. They know that it is useless; and everybody desires it reclaimed. It is a very simple proposition; and the answer to the objection of the gentleman from Illinois is this: that where this differs from the swamp-land grants is that the Government does not grant this at all. The Government only grants it and the State only receives title to it after it has made its proof that the land is reclaimed. So this does not pass to the States as the swamp land passed to the States." Id.

"Mr. VAN VOORHIS of New York. If the States should disregard the restrictions, is there any remedy?

"Mr. NEWLANDS. I presume there is.

"Mr. PICKLER. This amendment provides that the lands shall not be ceded to the States until they have complied with the regulations prescribed by the Secretary of the Interior." Id. at 8427.

"Mr. McRAE. . . . The Senate amendment is in my judgment extremely dangerous, and should not be adopted.

"On yesterday I pointed out some of the objections to it, but since the gentleman from South Dakota has abandoned it and is satisfied to adopt the substitute which I offered, it is not now necessary to discuss it further. I would prefer to see no legislation at this time and in this way, but if the question can not be postponed for a more careful consideration then we should pro-

ceed with all the caution and care that is possible under the circumstances, for the legislation is important and far reaching. The amendment does not appear to be understood by some who have opposed it. It has been likened to the swampland grant of September 28, 1850.

"That was a grant *in presenti* and passed the title as of the date of the grant. This is no grant at all, but only gives authority to the Secretary of the Interior and President to make contracts binding the United States to donate the land to the States when reclaimed. That act passed the title to the whole of the swamp and overflowed lands which were unfit for cultivation and unsold at that time to the States. This grants nothing and authorizes no conveyance until reclamation.

> "There was no limit to the swamp land grant as to the area to be taken or the time when it should be selected. Under this bill the area to each State is limited to 1,000,000 acres and the time for reclamation ten years after contract. Under the swamp land grant the States were left free to dispose of the lands before reclamation and without any limitation as to the quantity that could be sold to one person. Under this amendment the States must reclaim the land before they get it and must provide for its settlement and occupancy by bona fide settlers, and can not sell exceeding 160 acres to any one person." Id. at 8431.

While the policy underlying a legislative enactment normally need not be considered when the meaning of the act is clear, nevertheless, it does offer insight

into the legislative intent. The Carey Act represents a deliberate policy change in contradistinction to the outright grants of the swamp land acts and entrusted the Secretary of the Interior with broad discretion through his power to contract with the States.

Administrative interpretation of a statute is an important construction aid to identify the legislative intent and is entitled to considerable weight where the administrative interpretation is close in time to the pasage of the Act, and has endured the passage of time. *Sunray Mid-Continent Oil Co.* v. *F. P. C.*, 364 U.S. 137, 80 S. Ct. 1392, 4 L. Ed. 2d 1623 (1960). The Department of the Interior held the view in 1908 that the Carey Act was not an *in praesenti* grant, but rather invested the Secretary of the Interior with discretion to contract with the end in mind of patenting acreage to the States.

> "It is clear from the terms of the act of August 18, 1894, *supra*, under which the application of the State is filed, that the acceptance of the offer of the State is a matter wholly within the discretion of the Department. The filing of the application is preliminary to the formation of a contract between the State and the United States. It is manifest that the formation of such contract depends upon the acquiescence of both parties thereto without a right in either to insist upon a proffer or acceptance by the other. It is equally clear that when the lands made the subject-matter of the proposed contract have been set aside for other purposes, the Secretary of the Interior, as the authorized representative of

the Government in such matters, is fully warranted in declining to enter into any contract with the State which would defeat the object for which the lands were set aside. The State has no right to insist that he should. As his discretion is not subject to control by the State, a hearing for the purpose of determining whether or not that discretion has been properly exercised can not be demanded by the State. So long as a withdrawal made by him under authority of law remains unrevoked the presumption so far as third persons having no interest in the land withdrawn are concerned, that his discretion was properly exercised is conclusive, and so long as such withdrawal remains in force the land covered thereby is not subject to any claim of the State under the Carey Act." *State of Wyoming*, 36 L. D. 399-400 (1908).

That an *in praesenti* grant of title did not occur under the Carey Act seems quite clear from the language of the Act, the legislative history, administrative interpretations, and court interpretations, albeit dicta. It is likewise clear, however, that the Carey Act and subsequent enactments conferred upon the State of Idaho a right of entitlement to three million acres of desert land suitable for irrigation, cultivation and settlement. The State is guaranteed a maximum entitlement of three million acres of suitable desert land for Carey Act development to select from time to time, which it cannot be deprived of by the Secretary of Interior, if the State meets the conditions of the Carey Act. However, the State may not perfunctorily select acreage previously withdrawn for

other purposes such as in this case a withdrawal for stock-driveways. The Secretary is under an obligation to preserve enough desert land suitable for Carey Act development to fulfill the State's right of entitlement, which the Federal Government must contract to donate to the State in accordance with the Act. To the extent the land has been withdrawn for other purposes by the Secretary and the State remains desirous of initiating a Carey Act development on such acreage, its remedy is to petition the Secretary to reclassify the lands suitable for Carey Act entry. The Secretary may not arbitrarily deny the State's application for reclassification, withdrawal and Carey Act segregation. The Secretary's ruling, once final, is reviewable under the standards set forth in *Bronken* v. *Morton*, 473 F. 2d 790 (9th Cir. 1973), *cert. denied*, 414 U. S. 828, 94 S. Ct. 51, 38 L. Ed. 2d 62 (1973), *Richardson* v. *Udall*, 253 F. Supp. 72 (D. C. Idaho 1966), and the Administrative Procedure Act, 5 U.S.C.A. § 706. Such a construction of the Carey Act is consistent with 43 U.S.C.A. 315f and its proviso empowering and directing the Secretary to classify the public lands as more valuable or suitable for certain purposes upon application by a qualified applicant. *See, Bleamaster* v. *Morton*, 448 F. 2d 1289 (9th Cir. 1971). The Court does not accept the State's argument that it is absolutely entitled to select *any* land on the public domain for Carey Act development, for such a construction does not comport with the wording of the Act, its legislative history, other acts of Congress regarding the

public domain, as well as the broad discretion invested in the Secretary of Interior as manager of the public domain.

II.

The second issue before the Court is whether a husband and wife may make adjoining entries of 160 acres each under the Carey Act and whether a residence constructed on the dividing line between the two entries satisfies the settlement requirement of the Act.

In 1974 the Idaho Legislature amended the State's Carey Act in pertinent part as follows:

> "For the purpose of any drawing and/or selection of land for entry under this section or section 42-2013A, Idaho Code, a husband and wife shall be allowed to join their entries and receive a total of three hundred twenty (320) acres in one drawing or selection." 42 Idaho Code § 2013 (1974).

Relevant language of the Carey Act provides:

> "As fast as any State may furnish satisfactory proof . . . that any of said lands are irrigated, reclaimed and occupied by actual settlers, patent shall be issued to the State . . .: *Provided*, That said States shall not sell or dispose of more than one hundred and sixty acres of said lands to any one person . . ." 43 U.S.C.A. § 641.

On August 29, 1974, the Deputy Solicitor to the Director of the Bureau of Land Management issued an opinion which the United States represents is the final agency position on the matter.

In concluding that Section 2013, Idaho Code, Title 42, is at odds with the legislative purpose and Department of Interior precedent, the Solicitor states that it is not possible for both a husband and wife who are not separated to qualify for 160 acres each since it is presumed that they will share the same residence and this mutual residence can only be located on one 160-acre tract. The underlying reasoning of the Solicitor's opinion is that from the overall context of the Act, the phrase "any one person" in the proviso means "actual settler," as the latter phrase is used to modify the phrase "any one person." Based on Department of the Interior precedent, the term "actual settler" has an established meaning of "actual resident." Further, the Solicitor reasons that "actual resident" means that a family is entitled to only one 160-acre tract. The Court has no difficulty accepting the Solicitor's first step, namely, that an actual settler is a person who goes upon the land with the intent of making it his home. *United States* v. *Atterbury*, 10 L.D. 36 (1890), *State of Oregon*, 36 L.D. 36 (1908). It is most difficult for this Court to accept the Solicitor's second step, i.e., that the phrase "actual resident" envisions one family per 160-acre tract, in light of the actual language used in the statute.

A number of rules of statutory construction were employed in the first part of this opinion and those rules are equally applicable here. The wording of the statute is free from ambiguity as the word "person" is modified by the word "one." While the word-

ing excludes more than one Carey Act entry per person, to read the word "person" to mean "family" or "husband and wife" rewrites the statute.

Since the wording of the Act is free from ambiguity, the legislative history need not be consulted, yet, in order to gain further insight into the intent, the Congressional Record may be consulted. The history does not reveal that a different meaning was intended than the literal meaning of the words used. The following passages support a literal interpretation of the statute, and, although the debate reflects a desire to effectuate development of homes upon the desert domain, such a desire fails to indicate that a husband and wife were excluded from making a 160-acre entry each.

In the House, the Senate Report prepared by Mr. Carey was read in the record. The report states in part:

> ". . . The title is not to pass out of the Government until the two chief conditions of the bill are fully complied with. First, that the lands shall be fully reclaimed; and second, that the land shall be settled upon in tracts not exceeding 160 acres to *each settler*.
>
> * * * * *
>
> "If the States complied with the conditions of the act, the lands would be reclaimed, settled upon, and disposed of to actual settlers in small tracts thereby accomplishing the same purpose as is contemplated by the homestead laws of the United States." 26 Cong. Rec. 8390 (1894) (Emphasis added)

Commissioner Lamoreux stated, in part, in a letter introduced in the House:

> "* * * * *
>
> "The bill further provides that when competent proof is furnished by any State that any of the lands reserved are reclaimed and occupied by actual settlers, in tracts not exceeding 160 acres to *each settler*, patents shall issue to the State or its assignees for such lands so reclaimed and settled in tracts not exceeding 160 acres to *each person*, . . ." Id. (Emphasis added)
>
> "Mr. McRAE. . . . One of the conditions of this measure is that not exceeding 160 acres shall be sold by the State to any *one individual*." Id. at 8391.
>
> * * * * *
>
> "Mr. BRYAN. . . . But certainly no one will object to allowing these States to take these lands, useless to us as a nation, and irrigate them, make them valuable, and then sell them to *citizens who will establish homes* upon them. This amendment provides that these lands shall not be disposed of in greater quantities than 160 acres to *one person*." Id. at 8419 (Emphasis added)
>
> * * * * *
>
> "Mr. BRYAN. . . . It seems to me, Mr. Speaker, that this measure gives a promise of very great good, because the more *homes* we can establish, the more independent citizens we can put upon our lands, the more stable is the Government under which we live, and the more general will be our prosperity . . ." Id. at 8420 (Emphasis added)

"Mr. HERMAN. . . . Let the bill so protected be passed, for our people will welcome it as the best we can secure, and while we are doing this it behooves us to guard every provision which otherwise may be construed adversely to the interests of the real beneficiaries for whom this legislation is had—the *home-seeking* and *home-deserving* people of the United States . . ." Id. at 8424 (Emphasis added).

* * * * *

"Mr. ELLIS of Oregon. . . . This act, is passed, does not suspend the desert land act, nor prevent those who desire to take land directly from the Government from doing so, provided they comply with the law, rules, and regulations. It only enables the State to do what the individual by reason of poverty can not do, and after it has made the land fertile and the prospect of obtaining an easy living therefrom, then the man who could not accomplish the result alone may come in and *purchase for himself and family a home,* his success will be assured, and the State or General Government will in no sense be losers . . ." (Emphasis added) Id. at 8425.

* * * * *

"Mr. LUCAS. . . . It seems to me that the bill is explicit and careful in its provisions, guarding all the rights of the Federal Government. The title can not pass to the State until reclamation is secured and then must be awarded to settlers in *160-acre lots for bona fide homes.*" Id. at 8430 (Emphasis added)

Even if the phrase "any one person" could have different meaning, the Government's construction is out of harmony with the rule of construction used by the Secretary, namely, where words admit of different meanings, it would be right to adopt that which is more favorable to the interests of the public. *J. B. Raymond,* 2 L.D. 854 (1884).

The Secretary relies heavily on Land Decisions under the Homestead Act. Such decisions hold that two entries by a husband and wife are precluded by the Act and further, that a house constructed on the dividing line between two tracts will not validate such entries. *Case* v. *Kupferschmidt,* 30 L.D. 91 (1900), *Jane Mann,* 18 L. D. 116 (1894), *Lincoln* v. *Gisselberg,* 17 L. D. 215 (1893), *William A. Parker,* 13 L. D. 734 (1891), *Stella G. Robinson,* 12 L. D. 443 (1891), *Emma F. Stewart's Heirs,* 12 L. D. 197 (1891), *John O. and Minerva C. Garner,* 11 L. D. 207 (1890), *Bullard* v. *Sullivan,* 11 L. D. 22 (1890), *Thomas E. Henderson,* 10 L. D. 266 (1890), *L. A. Tavener,* 9 L. D. 426 (1889). *But see*: *Bloom* v. *Holmes,* 44 L. D. 148 (1915), *Patrick Flynn,* 39 L. D. 593 (1911), *Anderson* v. *Hillerud,* 33 L. D. 335 (1904), *Emily M. Dronberger,* 10 L. D. 88 (1890).

The above decisions were issued pursuant to the Homestead Act and for that reason they cannot be precedent for construing the Carey Act. Each statute has different wording, and the Secretary has recognized that the Department's rulings are controlled

by the language used in the act in question.[6] *Selway* v. *Flynn*, 6 L. D. 541 (1888). In *Selway* v. *Flynn*, which involved entry by a married woman under the Desert Land Act, the ruling subject of the appeal was as follows:

> "I am of the opinion that the desert land act should be construed with reference to the relations and disqualifications of coverture at common law and as it forbids more than one entry of six hundred and forty acres by one person that it did not intend that a maried man and woman should each be allowed an entry thereunder. I am aware that there have been decisions holding to the contrary, but with my views on the subject, I must decline to follow said precedents. I therefore sustain your original decision rejecting Mrs. Selway's application . . ." *Supra*, at 542.

On appeal the Commissioner reached a contrary result in light of the language of the Desert Land Act:

> "I cannot agree with you that the law providing for the sale of desert lands prohibits the entry thereunder by a married woman. The statute provides:—
>
> 'It shall be lawful for any citizen of the United States or any person of requisite age who may be entitled to become a citizen, and who has filed

[6] *See also*: the reasoning and analysis of statutory language in *Delila* v. *Stukel*, 10 L. D. 47 (1890) holding valid an entry by a married woman under the Timber & Stone Act of 1878 and ruling that such an interpretation was consistent with construction of the wording used in the Desert Land Act.

> his declaration to become such, and upon payment of twenty-five cents per acre to file a declaration, etc.'
>
> "In the face of these provisions of the statute I have discovered no good reason for changing the construction of the law adopted by this Department in former decisions." Id.[7]

While residence on the land is not required under the Desert Land Act, *Cox* v. *Hart*, 270 Fed. 51 (9th Cir. 1921), *affirmed*, 260 U.S. 427, 43 S. Ct. 154, 67 L. Ed. 332 (1922), that does not command a different result for it is the wording and its clear meaning of the Carey Act which is controlling. To the extent that the rulings previously referred to under the Homestead Act were premised on a presumption that a wife's residence is that of her husband, it is notable that Idaho, by Section 2013, Idaho Code, Title 42, has seen fit to permit both husband and wife to make entry.[8] More importantly, to premise a denial of the right to make an entry upon such a presumption would, as has previously been stated, flout the language of the Carey Act.

[7] On September 30, 1910, the Department of the Interior issued a circular as follows:

> "Thus, a woman, whether married or single, who possesses the necessary qualifications, can make a desert-land entry, and, if married, without taking into consideration any entries her husband may have made."
>
> 39 L.D. 253 (1910)

[8] To deny either a husband or wife the right of entry on the ground that either has previously made an entry may have constitutional ramifications; however, that issue is not addressed in this Memorandum Decision.

This Court is not aided in this part of the Memorandum Decision by a contemporaneous opinion of the Department of the Interior at the time of passage of the Act; rather, the Department has relied upon precedent from other acts which are not controlling. All total, it follows under the language of the Carey Act, legislative history, as well as Department constructions of acts with closely-similar language, that a husband and wife are each entitled to make a 160-acre entry.

This court is of the view that since a husband and wife are entitled to make adjoining entries under the Carey Act of 160 acres each, that a house on the dividing line between the adjoining tracts satisfies the settlement and residency requirement. It is not contested that an actual residence on the tract is required. To require a husband and wife to divide their home by a breezeway or the like, or to construct separate residences on each tract would cause disutility. Such an economic restraint may well prohibit settlement in conflict with the intent of the Act. To impose such a restriction strikes this Court as an illogical selection of form over substance.

Moreover, construction of a house on the dividing line is permitted under case law and satisfies the residence requirement. *Silver* v. *Ladd*, 74 U.S. 219, 19 L. Ed. 138 (1869), *following*, *Lindsey* v. *Hawes*, 67 U.S. 554, 17 L. Ed. 265 (1863); *see also: George T. Burns*, 4 L. D. 62 (1885), *So. Pac. R. R. Co.* v. *Rahall*, 3 L. D. 321 (1885), *Wright* v. *Woods*, 1 C.L.L. 304 (1875).

The defendant's motion for summary judgment is GRANTED as to the issue in Part I of this decision. The decision of the Interior Board of Land Appeals (21 IBLA 210) is AFFIRMED as stated in Part I of this decision.

The plaintiffs' motion for summary judgment as to the issues discussed in Part II of this decision is GRANTED.

Within five (5) days from the date of receipt of a copy of this Memorandum Decision and Order, counsel for each of the parties will prepare and submit to the court a proposed summary judgment effectuating this decision and order.

DATED this 15th day of July, 1976.

/s/ J. Blaine Anderson
J. BLAINE ANDERSON
United States District Judge

APPENDIX C

UNITED STATES DEPARTMENT
OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 Wilson Boulevard
Arlington, Virginia 22203

IDAHO DEPARTMENT OF WATER RESOURCES

IBIA 75-357 Decided July 31, 1975

Appeal from the decision of the Idaho State Office, Bureau of Land Management, partially rejecting an application for a temporary withdrawal of lands for proposed development under the Carey Act of 1894.

Affirmed.

1. Act of March 5, 1910—Act of August 18, 1894 (Carey Act)—State Selections—Withdrawals and Reservations: Stock-driveway Withdrawals

   An application filed by a State under the Act of March 5, 1910, for a temporary withdrawal of lands to aid in the selection of the lands for proposed development under the Carey Act of 1894 must be rejected where the lands are withdrawn for stock-driveway purposes, and cannot be suspended pending consideration of a petition for reclassification of the lands as suitable for selection under the Carey Act.

2. Act of March 5, 1910—Act of August 18, 1894 (Carey Act)—State Selections—Withdrawals

and Reservations: Stock-driveway Withdrawals

A grant of lands to a State under the Carey Act of 1894 is not a grant *in praesenti*, vesting title to any particular lands as of the time of passage of the act or by relation back upon fulfillment of the conditions imposed by the act, but the allowance or rejection of an application by a State under the Act of March 5, 1910, for a temporary withdrawal of lands to aid in the selection of the lands for proposed development under the Carey Act is a matter wholly within the discretion of the Department; and where the lands sought to be selected by the State are embraced within a stock-driveway withdrawal made by the Secretary of the Interior under authority of law, they are not, so long as such withdrawal remains in force, subject to any claim of the State under the Carey Act.

APPEARANCES: Nathan W. Higer, Esq., Office of the Attorney General, State of Idaho, Boise, Idaho, for appellant; Riley C. Nichols, Esq., Office of the Solicitor, U.S. Department of the Interior, Boise, Idaho, for appellee, Bureau of Land Management.

OPINION BY ADMINISTRATIVE
JUDGE LEWIS

The State of Idaho through its Department of Water Resources filed an application pursuant to the Act of March 15, 1910, 43 U.S.C. § 643 (1970), for the temporary withdrawal of some 27,400 acres of land for proposed development under the Carey Act

of 1894, 43 U.S.C. §§ 641 *et seq.* (1970), by the Lake Side Irrigation Project.

The Carey Act of 1894 reads, in applicable part:

> To aid the public-land States in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior with the approval of the President is * * * authorized and empowered, upon proper application of the State to contract and agree, from time to time, with each of the States in which there may be situated desert lands as defined by the * * * [desert-land law, 43 U.S.C. §§ 321 *et seq.*] binding the United States to donate, grant and patent to the State free of cost for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed, occupied, and not less than twenty acres of each one hundred and sixty acre tract cultivated by actual settlers, as thoroughly as is required of citizens who may enter under the said desert-land law, within ten years from the date of approval by the Secretary of the Interior of the State's application for the segregation of such lands; and if actual construction of reclamation works is not begun within three years after the segregation of the lands or within such further period not exceeding three years, as shall be allowed by the Secretary of the Interior, the said Secretary of the Interior, in his discretion, may restore such lands to the public domain; * * *.

The Act of March 10, 1910, *supra*, authorized temporary withdrawals upon application by the states to aid in carrying out the purposes of the Carey Act.[1]

By decision of January 24, 1975, the Idaho State Office, Bureau of Land Management (BLM), rejected the application in part because some of the lands are embraced in various withdrawals and are not available for selection under the Carey Act, including the following-described lands which are withdrawal for stock-driveway purposes under Stock Driveway No. 25 by order issued on August 18, 1955:

> T. 9 S., R. 25 E., B.M., Secs. 13, 14, 15, 24, 25
> T. 9 S., R. 26 E., Secs. 19, 20, 21, 22, 23, 24, 25
> T. 9 S., R. 27 E., Secs. 27, 28, 29, 30

The Idaho Department of Water Resources appealed to this Board only from that part of the decision which rejected the above-described lands included in the stock driveway withdrawal.[2] At the

---

[1] We note that the regulations pertaining to the Carey Act were last published in 43 CFR 2222.6-2222.6-6 (rev. January 1, 1970), these pertaining to temporary withdrawals under the 1910 act being 43 CFR 2222.6-2. These sections, among others, were deleted by an order in 1970 as unused or obsolete. *See* 35 F.R. 3072.

[2] Thus, the decision has become final as to its rejection of the following-described lands for the reasons given:

> "Withdrawn for Reclamation Purposes for the Minidoka Project:
>
> T. 9 S., R. 25 E.
>
> Sec. 12, All;
>
> Sec. 15, W 1/2 NW 1/4;
>
> Sec. 23, NE 1/4 NE 1/4 SW 1/4.

[Footnote continued on page 34a]

same time that it filed its statement of reasons for appeal, appellant also filed with the Board a petition by the Lake Side Irrigation Project Association under section 7 of the Taylor Grazing Act, 43 U.S.C. § 315f (1970), for reclassification of these lands in the stock-driveway withdrawal as suitable for use under the Carey Act.

[1] In its first point on appeal, the appellant argues that its application for a temporary withdrawal of the lands withdrawn for stock-driveway purposes should have been suspended, and not rejected, pending a decision on the petition filed with this Board for reclassification of the lands as suitable for disposition under the Carey Act.

Although this contention may seem plausible at first glance, it is not tenable under the regulations. 43 CFR 2313.1(c) of the stock-driveway regulations provides that:

---

[2] [Continued]

T. 9 S., R. 27 E.,

Sec. 20, N 1/2.

"Withdrawn for the Minidoka National Wildlife Refuge by Executive Order 8600:

T. 9 S., R. 27 E.,

Sec. 20, N 1/2.

"The following described lands are included in State Exchange application I-8154. In accordance with the regulations of 43 CFR 2091.2-3, these lands are segregated from appropriation under the public land laws:

T. 9 S., R. 25 E.,

Sec. 33, SE 1/4 NE 1/4, SE 1/4;

Sec. 34, S 1/2 SW 1/4, SE 1/4;

Sec. 35, S 1/2."

> Lands withdrawn for driveways for stock * * * are not subject to entry or disposition, and applications for the acquisition of lands so withdrawn will be rejected by the authorizing officer. * * *

Therefore, BLM properly rejected appellant's application. The rejection of the application was also mandated by general regulation 43 CFR 2091.1 which provides in pertinent part that:

> * * * applications which are accepted for filing must be rejected and cannot be held pending possible future availability of the land or interests in land, when approval of the application is prevented by:
>
> (a) Withdrawal or reservation of lands * * *

Furthermore, the Department has consistently held that an application for withdrawn lands must be rejected, and it is impermissible to hold the application in suspense until the land may become available. *Juan N. Menchaca*, 14 IBLA 212 (1974); *Robert M. Ford*, 4 IBLA 321 (1972); *Reed L. Adams*, A-30950 (October 16, 1968).

Accordingly, the application must be rejected and cannot be suspended pending consideration of the petition for reclassification of the lands as suitable for selection under the Carey Act.

With respect to appellant's second argument on appeal, appellee's answer to appellant's statement of reasons on appeal ably and correctly discusses the facts and the applicable law, with which we agree.

Accordingly, we adopt appellee's discussion as hereinafter set out in toto.

[2] In Appeal Point No. 2, appellant argues, in effect, that the State's right to segregate and withdraw land under the Carey Act of 1894, *as amended*, vested at the time of passage of the Act and, therefore, takes precedence over subsequent withdrawals and other uses which the Secretary may consider more appropriate. The argument assumes that the Carey Act grant was a grant *in praesenti* and that the Secretary has no discretion in deciding whether or not to withdraw and segregate particular lands when requested to do so by a qualified State. These assumptions are contrary to the language of the statute and Departmental and judicial precedents.

Thus, the statute is couched in discretionary language, authorizing and empowering—not requiring—the Secretary to contract and agree with the states to donate, grant, and patent lands. The discretionary nature of the Carey Act was discussed in *State of Wyoming*, 36 L.D. 399, 399-400 (1908), as follows:

> It is clear from the terms of the act of August 18, 1894, *supra*, under which the application of the State is filed, that the acceptance of the offer of the State is a matter wholly within the discretion of the Department. The filing of the application is preliminary to the formation of a contract between the State and the United States. It is manifest that the formation of such contract depends upon the acquiescense of both parties thereto without a right in either to insist upon a proffer or acceptance by the other. It is

> equally clear that when the lands made the subject-matter of the proposed contract have been set aside for other purposes, the Secretary of the Interior, as the authorized representative of the Government in such matters, is fully warranted in declining to enter into any contract with the State which would defeat the object for which the lands were set aside. The State has no right to insist that he should. As his discretion is not subject to control by the State, a hearing for the purpose of determining whether or not that discretion has been properly exercised can not be demanded by the State. So long as a withdrawal made by him under authority of law remains unrevoked the presumption, so far as third persons having no interest in the land withdrawn are concerned, that his discretion was properly exercised is conclusive, and so long as such withdrawal remains in force the land covered thereby is not subject to any claim of the State under the Carey Act.

With respect to the nature of the grant contemplated by the Carey Act, *as amended*, it is clear from the language of the Act that the grant was not intended as a grant *in praesenti*, vesting title to any particular lands as of the time of passage of the Act or by relation back upon fulfillment of the conditions imposed by the Act. Thus, the Act merely authorizes the Secretary to contract in the future with the various states to grant them a maximum quantity of desert lands upon the fulfillment of certain conditions. The Act does not use the phrase "hereby granted" which Congress would have inserted had it

intended the grant to be one *in praesenti.* Furthermore, the courts and the Department have consistently held that the Carey Act was not intended as a grant *in praesenti.*[3]

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed and the case is returned to the BLM for initial consideration of the petition for reclassification of the lands in the stock-driveway withdrawal, and for further action on the remaining lands in the application for temporary withdrawal.

/s/ Anne Poindexter Lewis
ANNE POINDEXTER LEWIS
Administrative Judge

We concur:

/s/ Frederick Fishman
FREDERICK FISHMAN
Administrative Judge

/s/ Martin Ritvo
MARTIN RITVO
Administrative Judge

---

[3] *E.g., McKinney* v. *Big Horn Basin Development Co.*, 167 Fed. 770 at 775 (8th Cir. 1909); *State ex rel. Armington* v. *Wright*, 44 Pac. 89 at 92 (Mont. 1896); *Carey Act Selections*, 48 L.D. 160 (1921). *Cf. State of Wyoming*, 36 L.D. 399 (1908).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1-75-22

STATE OF IDAHO, EX REL. CECIL D. ANDRUS, Governor; R. KEITH HIGGINSON, Director, IDAHO DEPARTMENT OF WATER RESOURCES; AND THE IDAHO WATER RESOURCE BOARD, PLAINTIFFS

—*vs*—

THOMAS S. KLEPPE, Secretary of the Interior,
DEFENDANT

AMENDED SUMMARY JUDGMENT

This matter was heard by the court on April 30, 1976, on cross-motions for summary judgment and again on August 26, 1976, on defendant's motion for clarification and reconsideration following the entry, on July 15, 1976, of the court's Memorandum Decision and Order. All parties and amicus curiae appeared by their respective counsel at both hearings and the court having fully considered and reconsidered the records, files, briefs and all oral arguments, and there being no genuine material issues of fact, summary and declaratory judgment was entered on August 27, 1976. By subsequent orders of the court entered on September 4 and November 15, 1976, the judgment was amended to correct particular oversights, thereby conforming the judgment to the in-

tent of the court. The amended judgment is entered reflecting all oversight corrections as follows:

IT IS HEREBY ORDERED and ADJUDGED that plaintiffs' prayer for a declaration that they have an absolute right to demand three million acres of the public domain (as reduced by prior patents issued pursuant to the Carey Act) without any regard to previous classifications and withdrawals made by defendant, acting pursuant to lawful authority, is DENIED, and the decision of the Interior Board of Land Appeals (21 IBLA 210) is AFFIRMED.

IT IS FURTHER ORDERED, ADJUDGED and DECLARED HEREBY, that plaintiff, State of Idaho, by reason of the expressed Congressional purposes and the terms and conditions of the Carey Act, is entitled to have withdrawn and patented three million acres of the desert lands in the public domain (as reduced by prior patents issued pursuant to the Carey Act) situate in the State of Idaho for entry under said Act, providing that there are sufficient lands of such kind, quality and character within the State of Idaho, and providing that the State of Idaho satisfies all of the terms and conditions of said Act so as to entitle it to contract with the defendant, acting for the United States of America, in order to carry out the expressed purposes of said Carey Act.

That by reason of the expressed Congressional purposes and the terms and conditions of the Carey Act, the United States of America, acting by and through the defendant, has bound itself to contract, donate,

grant and patent to the State of Idaho, upon compliance with the stated conditions, desert lands, which the State may cause to be irrigated, reclaimed and occupied by actual settlement, but not to exceed three million acres, as that sum may be reduced by prior patents issued pursuant to the Carey Act.

IT IS FURTHER ORDERED, ADJUDGED and DECLARED HEREBY that as to desert lands remaining in the public domain presently withdrawn by the defendant for other purposes, and where the State of Idaho determines that it desires to initiate a Carey Act development on such lands, the State's remedy is to petition the defendant for temporary withdrawal under 43 U.S.C. Sec. 643 and/or under 43 U.S.C. Sec. 315f, and it is the duty of the defendant to entertain and act upon said petition or petitions in accordance with the public land laws of the United States of America and in accordance with due and proper administrative procedures.

IT IS FURTHER ORDERED, ADJUDGED and DECLARED HEREBY, that:

(1) Each person is entitled to enter 160 acres and not just 160 acres for each family unit, and

(2) A single family residence built on the common boundary line between entries of a husband and wife shall satisfy the residence and actual settlement for both 160 acre entries, as required by the Carey Act.

The motion of defendant for clarification or reconsideration is DENIED.

Each party shall bear its own costs.

DATED this 15th day of November, 1976.

/s/ J. Blaine Anderson
J. BLAINE ANDERSON
United States Circuit Judge
Sitting By Designation

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DC #1-75-22JBA
No. 77-1300
No. 77-1517

STATE OF IDAHO, APPELLANT

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
APPELLEE

April 19, 1979

Appeal from the United States District Court for the District of Idaho.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Idaho and was duly submitted. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and hereby is affirmed.

☆ U. S. GOVERNMENT PRINTING OFFICE; 1979 298683 52

Supreme Court, U. S.
FILED
NOV 29 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-260

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Petitioner

—*v.*—

STATE OF IDAHO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FILED: AUGUST 16, 1979
PETITION GRANTED: OCTOBER 15, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-260

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Petitioner

—*v.*—

STATE OF IDAHO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

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* The opinions of the court of appeals, the district court, and the Interior Board of Land Appeals, the amended summary judgment of the district court, and the judgment of the court of appeals are reproduced as appendices to the petition for certiorari and are not printed here.

STATE OF IDAHO ex rel CECIL D. ANDRUS, Governor; R. KEITH HIGGINSON, Director, IDAHO DEPARTMENT OF WATER RESOURCES; and the IDAHO WATER RESOURCE BOARD, PLAINTIFFS

vs.

U.S. SECRETARY OF THE INTERIOR, ROGERS C. B. MORTON, DEFENDANT

RELEVANT DOCKET ENTRIES

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

DATE	PROCEEDINGS
1975	
Feb 21	Filed complaint
Jun 19	Answer of Def.
Aug 22	Motion of Ptffs. for Summary Judgment
Sep 17	Motion of Idaho Carey Act Dev. Assn. for leave to appear as amicus curiae
Sep 24	Order Granting leave to Idaho Carey Act Development Assoc. to appear as Amicus Curiae (JBA) cc: Nathan W. Higer; U.S. Atty.; Terry L. Crapo
Feb 26	Cross-Mo by deft. for S.J.
Apr 30	Record of hearing; Summary Judgment Motions taken under advisement (JBA)
Jul 15	Memo. Decision and Order re Motions for Summary Judgment (JBA) w/ attached CCM
Jul 27	LODGED proposed Summary Judgment of Ptffs.
Aug 6	Mo. of Def. for Clarification and Reconsideration
Aug 26	Record of hearing; Def's Mo. for Clarification and Reconsideration Denied; Mr. Higer to submit formal Order (JBA)

DATE	PROCEEDINGS
1975	
Aug 27	Summary Judgment—partially in favor of Ptffs.; partially in favor of Def. and w/o Costs (JBA) Bk. 16, Pg. 25 w/ CCM
Sept. 1	Motion for amendment of summary judgment; order by plaintiffs
Sept. 7	Order amending summary judgment (JBA) w/ attached clerk's certificate of mailing (Book 16, p. 29)
Oct 22	Notice of Appeal by Def. USA w/ CCM
Nov 1	Motion for Amendment of S.J. by Ptff.
Nov 5	Notice of Cross-Appeal by Ptffs.
Nov. 15	Order granting motion to amend summary judgment (JBA)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

1977	
Feb 2	DOCKETED CAUSE & ENTERED APPEARANCES OF COUNSEL gr'h
Feb 28	FILED CERT TRANS OF RECORD ON APPEAL IN THREE VOLUMES. VOL. I, PLDGS, THREE CERT COPIES. VOL. II-III, R/T's, ORIG & ONE COPY.
Mar 28	Filed motion of Idaho Carey Act Development Assoc. for leave to appear as amicus curiae. (Schickele) ec
Apr 8	Filed order (K1) Upon due consideration, the Idaho Carey Act Development Association is granted leave to file an amicus curiae brief and its request to participate in oral argument is referred to the panel which hears the appeal on its merits. cf
Mar 12	As of 3/6/79, ARGUED & SUBMITTED Before: ELY, KILKENNY, CJJ, FERGUSON, DJ -vt-

DATE	PROCEEDINGS
1979	
Apr 23	As of Apr 19, ORDERED OPINION FILED (PER CURIAM) & JUDG TO BE FILED & ENTD.
Apr 23	As of Apr 19, Filed Opinion—AFFIRMED.
Apr 23	As of Apr 19, Filed & Entd Judgment. -dmf-
11 Jul 1979	MANDATE ISSUED

WAYNE L. KIDWELL
Attorney General
State of Idaho
by NATHAN W. HIGER
Assistant Attorney General
State Capitol
Boise, ID 83720
TELEPHONE: 384-2215

ATTORNEYS FOR PLAINTIFFS

[Filed Feb. 21, 1975]

UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

Civil No. 1-75-22

STATE OF IDAHO ex rel CECIL D. ANDRUS, Governor; R. KEITH HIGGINSON, Director, IDAHO DEPARTMENT OF WATER RESOURCES; and the IDAHO WATER RESOURCE BOARD, PLAINTIFFS

vs.

U.S. SECRETARY OF THE INTERIOR,
ROGERS C. B. MORTON, DEFENDANT

COMPLAINT

COMES NOW the Plaintiffs and by way of Complaint against the Defendant, complain, state and allege as follows:

FIRST CAUSE OF ACTION

I

Plaintiff, Cecil D. Andrus is the duly elected Governor of the State of Idaho. Plaintiff, R. Keith Higginson, is the Director of the Department of Water Resources, State of Idaho, and in such capacity is responsible for the administration of any and all applications and proceedings under what is commonly called the Carey Act

(43 USC 641). Plaintiff, Idaho Water Resource Board, is an applicant for segregation of certain lands for construction of a project for reclamation and irrigation of dessert lands in Idaho under the Carey Act. The Defendant, by and through his agent, the Director of the Bureau of Land Management, Boise, Idaho, has control and supervision of certain federal lands within the State of Idaho that are desert in character.

II

Jurisdiction of this matter lies with this Court by virtue of a federal question existing and amounts of money involved have a value in excess of $10,000, exclusive of costs and interest. In addition, this Court has jurisdiction pursuant to the Federal A.P.A. (5 USC 701 et seq).

III

The Defendant's agent (hereinafter Bureau of Land Management) has notified Plaintiff, R. Keith Higginson, that he will not allow the requests for segregation or withdrawal under the Carey Act as a matter of right. The Defendant specifically alleges that he has the authority to determine what lands are suitable for disposal under the Carey Act, even though the lands refused to be granted are in fact desert and suitable for agricultural use and settlement. By virtue of various acts of Congress, the United States has bound itself to donate, grant and patent to the State of Idaho, free of cost for survey or price, three million acres of desert lands if the State causes the same to be irrigated, reclaimed and occupied. By virtue of decisions already received from the Bureau of Land Management, the Plaintiff believes that the Defendant intends to and has violated the contract established by said Carey Act to convey these lands upon request of the State. The Plaintiff believes that these lands are subject to temporary withdrawal and/or segregation upon Plaintiff's request and the Defendant is without any discretion to deny desert lands once requested.

Wherefore, the Plaintiffs, Cecil D. Andrus and R. Keith Higginson, demand judgment of this Court declaring that the State of Idaho has an absolute right to demand up to three million acres of desert lands under the Carey Act and further declaring that the Defendant, through his agent, Bureau of Land Management, has no authority or discretion to deny any request for segregation or withdrawal when presented by the Plaintiff.

SECOND CAUSE OF ACTION

COMES NOW the Plaintiffs, and by way of a second cause of action against the Defendant, state, allege and complain as follows:

I

Plaintiffs reallege in toto the allegations of Paragraphs I and II of the first cause of action.

II

The Defendant, by and through his agent, the Director of the Boise, Idaho Office of the Bureau of Land Management (hereinafter Bureau of Land Management) has notified the Plaintiffs and each of them, that they will follow the directions given to the Bureau of Land Management by a Solicitor's Opinion, dated August 29, 1974 (copy attached hereto and made a part hereof by reference thereto). Said opinion refers in part to certain amendments made to the Idaho Carey Act (*Idaho Code*, § 42-2013, amended by Chapter 164, 1972 Session Laws, page 1400) which provides:

> "For the purpose of any drawing and/or selection of land for entry under this section or section 42-2013a, Idaho Code, a husband and wife shall be allowed to join their entries and receive a total of three hundred twenty (320) acres in one drawing or selection . . ."

The Solicitor's Opinion and the Bureau of Land Management, intend to and have declared that it would be unlawful and in violation of the Federal Carey Act for the State of Idaho to proceed in the manner authorized by

said State Law, even though a Solicitor's Opinion, dated March 7, 1968, states it would be proper. The Bureau of Land Management holds that a husband and wife are not two separate persons, as provided in the Federal Act and are therefore not entitled to 320 acres of land for settlement and reclamation and threatens legal action if the Plaintiff, R. Keith Higginson, proceeds pursuant to the above State Law. The Plaintiff has received requests for segregation under the Carey Act which are intended to be settled by a husband and wife on 320 acres.

III

The Plaintiff, R. Keith Higginson, as Administrator of the State Carey Act, must have clarification of the legal rights of the State of Idaho so that he can properly and without fear of legal action, proceed to patent lands under the Carey Act as provided by State Law. If the interpretation given by the Solicitor and the Bureau of Land Management is correct, and the Plaintiff, R. Keith Higginson, proceeds under State Law as he is obligated to do, he will expend amounts of money in excess of $10,000 unnecessarily and will place hundreds of applicants in untenable positions whereby they assume and believe 320 acres are available to a husband and wife and expend money accordingly and later find that only 160 acres are available. Although 320 acres makes an economically feasible project, 160 acres does not and these applicants would be forced to abandon their entries. The Plaintiff, R. Keith Higginson, needs clarification of the State's rights and duties so that he can properly proceed.

IV

The Plaintiff, Idaho Water Resource Board, is an applicant under the Carey Act for development of what is commonly called Indian Hills. The above-referred to opinion holds that these lands are desert in character and subject to Carey Act entry, but for only 160 acres for a husband and wife. The Plaintiff's, Idaho Water Resource Board, project for said lands calls for entries of

320 acres for a husband and wife and is not economically feasible with 160 acre entries. The Plaintiff, Idaho Water Resource Board, will expend in excess of two million dollars in developing said project on the basis of 320 acre entries and would lose that money if the State of Idaho was prohibited from patenting 320 acres to a husband and wife. Before the Plaintiff proceeds, it needs clarification of its and the State's rights under the Carey Act. Plaintiff, Idaho Water Resource Board, has already requested segregation of the Indian Hills lands.

Wherefore, on Count II, the Plaintiffs and each of them, demand judgment of this Court declaring their rights under the Federal Carey Act and specifically declaring that the State of Idaho can patent 160 acres each to a husband and wife and that a joint granting of a 320 acre tract is valid and further declaring that the State as long as each person receives no more than 160 acres, can proceed in accordance with *Idaho Code*, § 42-2013 as amended and still be in compliance with the Federal Carey Act and further declaring that the opinion as written and if applied, would be a denial of equal protection of the laws to women.

THIRD CAUSE OF ACTION

COMES NOW the Plaintiffs and for a Third Cause of Action against the Defendant, complain, state and allege as follows:

I

Plaintiffs reallege in toto the allegations of Paragraphs I and II of the Second Cause of Action.

II

By virtue of the Solicitor's Opinion, the Bureau of Land Management intends to and will require the establishment of two separate distinction homes on each 160 acres by husband and wife entry persons. The Solicitor's Opinion and the Bureau of Land Management claim that one house built upon the line between the two quarter sections will not establish a valid residence under the Carey Act for both entries.

III

Plaintiff, R. Keith Higginson, is charged with examining each entry upon proof of reclamation and settlement being given, and if satisfied that the law has been complied with, he must cause patent to issue from the Federal Government to the State and then to the entryman. In order that the Plaintiff, R. Keith Higginson, may carry out his duties under the State and Federal Carey Acts, in a lawful manner, it is incumbent for him to know if he can issue patents to a husband and wife who have built only one house on the dividing line between their entries and whether one house so built will suffice as a residence for both entries.

IV

The Plaintiff, Idaho Water Resource Board, as an applicant for construction of a project must know whether or not one house built by a husband and wife on the line between two entries will suffice as residence for both entries. The feasibility of their project depends on the need for only one house and 320 acres. They will expend in excess of two million dollars if the project goes forward and must know, in order to avoid such a large loss, if the residence requirements can be met as outlined above.

WHEREFORE, the Plaintiffs and each of them, demand judgment of this Court declaring that the State of Idaho can issue patent for joint husband and wife entries where residence for both is established by building only one home on the dividing line between the two 160 acre entries.

DATED this 19th day of February, 1975.

WAYNE L. KIDWELL
Attorney General
State of Idaho

by /s/ Nathan W. Higer
NATHAN W. HIGER
Assistant Attorney General

[DoI Emblem]

UNITED STATES DEPARTMENT
OF THE INTERIOR

OFFICE OF THE SOLICITOR

Washington, D.C. 20240

In Reply Refer to: Aug. 29, 1974

Memorandum

To: Director, Bureau of Land Management

From: Solicitor

Subject: Interpretation of Carey Act with regard to Idaho proposal for reclamation of former Indian Hill Desert Land Entries

This opinion is in reply to your memorandum of June 7, 1974, in which you presented to us two issues for consideration:

(1) Does the Act of August 18, 1894, as amended, known as the Carey Act (43 U.S.C. §§ 641 et seq.), allow a State to patent two 160-acre parcels to a husband and wife when their actual residence is on only one of the parcels?

(2) Can the lands be considered desert in character and subject to Carey Act segregation as soon as Hoodco removes the pumping facilities which now convey water to the irrigation system on the lands?

Introduction

The State of Idaho is planning to submit proposals for Carey Act projects which would include the 2,860 acres of the so-called Indian Hill lands. At this time, the BLM Idaho State Director has temporarily withdrawn these lands from settlement or entry under the 1910 amendment to the Carey Act (43 U.S.C. § 643). Also, a proposed classification which would open the lands to Carey Act selection has been published in the Federal Register. (39 Fed. Reg. 9845, March 14, 1974.) Idaho intends to apply for segregation of the lands and to contract for installation and improvement of irrigation facilities if it is our legal opinion that the lands are subject to Carey Act application.

The Indian Hill lands were entered by various individuals under the Desert Land Act (43 U.S.C. §§ 321 et seq.) about 1963, and several patents were issued under that Act. These patents and all entries on the lands were cancelled on the basis that the entries and patents were fraudulently procured because individuals assigned their entry rights to the corporation that installed the irrigation system on the lands and never intended to individually reclaim, settle and cultivate the lands. This Departmental action was recently upheld by the courts in *Reed* v. *Morton*, 480 F.2d 634 (9th Cir. 1973), *cert. denied*, 414 U.S. 1064 (1973).

I. *Can husband and wife each receive a 160-acre parcel under the Carey Act?*

A recent amendment to Idaho law would permit a husband and wife to receive 160 acres each from the State under the Carey Act.* It is our opinion that the Carey Act does not allow this.

The Carey Act authorizes the Secretary of the Interior to contract with certain States to patent to them such desert lands as the States may cause to be irrigated, reclaimed, occupied and cultivated by "actual settlers." Individual settlers receive their patents from the State. Section I of the Act contains a proviso which states that "said States shall not sell or dispose of more than one hundred and sixty acres of said lands *to any one person.* . . ." (43 U.S.C. § 641.) Idaho representatives consider

* Idaho Code § 42-2013 was amended on April 1, 1974, to provide that "a husband and wife shall be allowed to join their entries and receive a total of three hundred twenty (320) acres [under the Carey Act]."

that a husband and wife are two "persons" within the meaning of the Act. This thinking is at odds with legislative purpose and Department precedent.

It is clear from the overall context of the statute that the term "person" in the proviso means "actual settler." The sentence immediately preceeding the proviso quoted above states that patents are to issue to a State as fast as it can prove "that any of said lands are irrigated, reclaimed and occupied by actual settlers. . . ." The initial sentence of the Act declares its purpose to be "to aid the public-land States in the reclamation of the desert lands therein, and the *settlement*, cultivation and sale thereof in small tracts to *actual settlers*." (Emphasis added.)

The record of Congressional consideration of the Carey Act bill confirms that Congress intended that the 160-acre limitation should apply not to each "person" but rather to actual settlers or entire households.

During debate on the floor of Congress concerning the practicality of the original Carey Act bill in 1894, there were numerous references by the Representatives to the 160-acre allotment of the bill. The Act is spoken of variously as providing 160 acres for "citizens who will establish homes," for "the home-seeking and home-deserving people," for the man who would establish "for himself *and family* a home" (emphasis added), and for "bona fide homes." 26 Cong. Rec. 8419-36 (1894). See also, S. Rep. 332, 53d Cong., 2d Sess. These expressions clearly indicate that members of Congress were considering the bill in terms of 160 acres being sufficient to provide a living for each family unit.

Most important in construing the legislative intent is the fact that before the Carey Act was considered and passed by Congress in 1894 the term "actual settler" had acquired a well-defined meaning in public land law. *United States* v. *Atterbery*, 10 L.D. 36 (1890). The term meant an "actual resident" or "one who has gone upon and occupied land with a bona fide intention of making it his home, and does some act in execution of such intention." *Id.; Rene* v. *Prendergast*, 17 L.D. 385 (1893). See also *Samuel M. Frank*, 2 L.D. 628 (1884). The *Atterbery* decision added to the general definition the note that one cannot be considered an actual settler who makes settlement through collusion with, and for the benefit of, another.

Subsequently, in *State of Oregon*, 36 L.D. 509 (1908), the Department held that the term "person" in the acreage-limitation proviso of the Carey Act means "actual settler." *

Under the law as it applies to "actual settlers" it is not possible for both a husband and wife who are not separated to qualify for 160 acres as actual settlers, since it is presumed that they will share the same residence and this mutual residence can be located upon only one 160-acre tract.**

Since it is our conclusion that the Idaho law would contravene the Carey Act in almost all cases, the question

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* The Department's interpretations of similar acreage-limitation provisions using the term "person" in other Acts have not always been consistent. The Homestead Act of 1862 (12 Stat. 392, now codified in scattered sections beginning at 43 U.S.C. § 161) was construed not to allow a married woman to make entry unless she was "a head of a family," which the Act provided for, or she qualified under one of the express provisions pertaining to married women (e.g., 43 U.S.C. § 167). See 43 CFR § 2511.1(b)(1) (1973). The Department also interpreted the Timber and Stone Act of 1978 (20 Stat. 89, 43 U.S.C. §§ 311-13; now repealed) to preclude a husband and wife from each claiming 160 acres where it would result in one person or one head of a family controlling both entries. See *Secretarial Letter*, 2 L.D. 332 (1882); *Dept. Circ.*, 51 L.D. 365 (1926); 43 CFR § 285.6 (1940). In the case of the Desert Land Act, however, the Department has allowed wives to make entries without regard to any entries made by their husbands. See 43 CFR 2521.1(a)(1) (1973). The opinions which established this position did not give the reasoning underlying their conclusion. See *Delila Stukel*, 10 L.D. 47 (1890), and authorities referred to therein, and *Selway* v. *Flynn*, 6 L.D. 541 (1888).

** We recognize that it is possible for cases to arise in which both husband and wife could qualify for 160 acres because they are separated and make bona fide settlement free from any collusion with their spouse.

may arise as to whether the Department could approve segregation of the land or grant patents to the State while the statute is still in force. Strictly as a matter of law, the Department can go so far as to issue patents to the State, but subsequently it would have to take legal action if the State attempted to issue patents under the husband-and-wife amendment to persons who were not actual settlers. In *State of Washington*, 26 L.D. 74 (1898), the Department dealt with the problem of conflicting language in the Carey Act concerning the conditions which must be fulfilled before patents can issue to a State. (43 U.S.C. §§ 641, 642.) It was held that settlement is not a condition precedent to the granting of patents to a State. In *State of Oregon*, 36 L.D. 509 (1908), the Department took the position that if a State attempted to patent lands to persons who were not "actual settlers", it would subject the grant to the State, at least those parts which the State attempted to alienate illegally, to forfeiture for condition broken.

II. *Can the lands be considered to be subject to disposition under the Carey Act?*

The Indian Hill lands are situated next to a 400-foot bluff on the south side of the Snake River. The bluff is nonirrigable public land and was not included in the desert land entries. Irrigation water is conveyed from the river to the farmland by a pumping station at the river's edge. The pumping facilities consist of two 24-inch steel penstocks and a number of large natural gas-powered pumps. A pipeline runs from the pumping site to a 200-foot ditch which empties into a holding pond on top of the bluff. The pumping site and pipeline are located on a right-of-way licensed to Indian Hill Irrigation Co.* From the reservoir two large ditches extend

* Indian Hill controls the right-of-way and pumping facilities on paper, but Hoodco has actual control as a mortgagee in possession protecting its interests, because it financed the irrigation system taking a pledge of Indian Hill stock as collateral. No action has been taken by the Government to cancel the right-of-way because it is being used to service private Hoodco lands.

west and south to provide water for sprinkler lines. The south ditch runs across the Indian Hill lands and onto a 640-acre tract privately-owned by Hoodco; it carries irrigation water for both the Indian Hill and Hoodco lands.

Although the Circuit Court's decision in *Reed* v. *Morton*, *supra*, confirmed government title to the Indian Hill lands, much of the property is still being occupied and farmed by a tenant of Hoodco under a stipulation entered into to protect and conserve the lands pending entry of final judgment. Under the stipulation, a wheat crop is being farmed with water for irrigation being provided by Hoodco. Hoodco is to provide water until maturity of the crop, and the tenant farmer is to vacate the land by September 15, 1974. When the crop is harvested, a stubble of at least three inches must be left to prevent erosion.

Your memorandum requesting this legal opinion states that Hoodco proposes to remove the pumping facilities around the end of the summer.* At a meeting on July 11, 1974, members of Idaho's Department of Water Resources, the State entity which would control Carey Act development, represented to the Department of the Interior that if the State obtains control of the Indian Hill lands under the Carey Act, it would not attempt to salvage any of the Hoodco pumping facilities because they are inadequate and worn-out; it would apply for a right-of-way near the present pumping site and contract for installation of a new pumping station employing electric power.

Assuming that Hoodco is definitely going to remove the present pumping facilities, and they will have to be re-

* We have been informed that if the Department approves an Idaho Carey Act application, the State will seek the cooperation of the Department in arranging with Hoodco to leave the pumping facilities in place to provide for a farming arrangement similar to that in the stipulation for the summer of 1975 in order to continue conservation of the topsoil while Carey Act development is beginning. Assuming this plan is carried out, it does not change our opinion.

placed by the State, it is our opinion that the Indian Hill lands can be considered as subject to Carey Act disposition.

The fact that wheat stubble will linger for some time without irrigation has no bearing on the issue. The Carey Act provides for reclamation through State action of "desert lands" as defined under the Desert Land Act.* This definition (43 U.S.C. § 322) states:

> All lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands. . . . The determination of what may be considered desert land shall be subject to the decision and regulation of the Secretary of the Interior or such officer as he may designate.

Since it is assumed that the stubble will certainly die and that crops will not survive without irrigation, the land, even while it is being farmed, should be considered "desert land." **

The stubble is like any growth that will remain after cultivation of desert land in a year of abnormal rainfall, and the remnants of such cultivation do not change the desert character of the land.*** The Desert Land Act regulations expressly provide that lands are desert in character even though they can support crops "in alternate years by means of the so-called dry-farming system. (37 L.D. 522 and 42 L.D. 524)." 43 CFR § 2520.0-8 (a) (1).*

* The term "desert land" is a legal term which was intended to encompass what most people consider "arid lands." See the record of Congressional debate on the Carey Act, 26 Cong. Rec. 8419-36 (1894), and 43 CFR § 2520.0-1.

** This is especially true since in this case the land has already once been determined to be desert land—when Desert Land Act applications were accepted from the entrymen in *Reed* v. *Morton, supra.*

*** For a recent case holding that the raising of a crop without irrigation during a year of abnormal rainfall is not evidence of reclamation, see *United States* v. *Elsie Marie Knowlton and Morris J. Knowlton,* A-30912 (1968).

The real issue is whether the Indian Hill lands must be considered to be "effectually reclaimed" and therefore not subject to disposition under the Carey Act.

The Department's regulations concerning lands subject to disposition under the Desert Land Act state that "land that has been effectually reclaimed is not subject to desert land entry." 43 CFR § 2520.0-8(a) (2). This regulation must be construed to apply to desert land being considered for Carey Act disposition.**

The term "effectually reclaimed" is not defined in the regulations. The term "reclamation" is defined as requiring "conducting water in adequate amounts and quality to the land so as to render it available for distribution when needed for irrigation and cultivation." 43 CFR 2520.0-5(a) (1). The regulations give no hint as to the intended meaning of "effectually", however. Relying simply on dictionary definitions of "effectually", one is led to conclude that effectual reclamation is reclamation which produces a result which is substantially in accordance with the definition but is somehow technically deficient.

A more thorough analysis of the regulation and its application to the situation at hand requires perception of the Congressional intent which it is designed to fulfill and the rationale of the case decisions in which the term has been used.

* The decisions cited in the regulation, *Pederson* v. *Parkinson* (1909) and *Houston* v. *Spaulding* (1913), respectively, describe "dry farming" as farming without artificial irrigation in years of abnormal rainfall or alternate years using special measures to conserve the moisture in the soil.

** The Carey Act regulations (43 CFR § 222.6 (1970)), under the heading of "Character of land subject to selection", state that character is to be determined under the Desert Land Act definition of desert lands and Departmental regulations and decisions. The cited Desert Land Act regulation occurs under the heading of "Land subject to disposition."

The Congressional debate on the Carey Act shows that the general plan was to provide a means whereby a State could shoulder the burden of developing land for reclamation homesteads where reclamation would require such substantial work and expenditure of money that it could not be handled by individual settlers. 26 Cong. Rec. 8419-36 (1894). The substantial reclamation work which is the responsibility of the State is the legal consideration for the contract under which it is to receive title to desert lands. "[R]eclamation is the only consideration for the donation or grant and is a condition precedent to the exercise of the power to grant." *Twin Falls Salmon River Land & Water Co.* v. *Alexander*, 260 F. 270, 272 (D. Idaho 1919), aff'd, 267 F. 382. Desert land is patented to a State under contractual terms which require reclamation work as consideration; and if, before the State applies for segregation of the lands (the contract is entered into when the application is approved), reclamation work has already been carried out to such an extent that there is nothing substantial left to do, there would not be adequate consideration for the contract.

Department decisions on effectual reclamation can be construed as consistent with this interpretation of the regulation from the viewpoint of the general purpose of the Act.*

The term "effectually reclaimed" was introduced into the regulations in 1965 following several Desert Land Act decisions which used the phrase for the first time.**

Earlier decisions spoke only of desert land which had already been "reclaimed", and they do not present sufficient facts to provide any guidance here.***

---

* There are no Federal court cases in point.

** There are no decisions in point under the Carey Act.

*** See *Taylor* v. *Rogers*, 14 L.D. 194 (1892); *Campbell* v. *Sutter*, 16 L.D. 40 (1893); *Len Everett*, A-27050 (1955). There are also many Departmental decisions dealing with the question of what constitutes sufficient reclamation for purposes of final proof under the Desert Land Act. These decisions are not in point because, as will be seen below, the term "effectual reclamation" was brought into the law apparently in order to differentiate from "reclamation" in the broad sense it is used in the Desert Land Act as indicating satisfaction of the requirements of final proof. Effectual reclamation does not require reclamation to the extent required for final proof.

The term was first used in *George W. Wilkinson*, A-29315 (1963). In the *Wilkinson* decision, the Department affirmed rejection of a desert land entry because the record showed that the applicant had cultivated and irrigated all irrigable portions of the land for a number of years before he filed his application. At the time of application, Government inspection showed that irrigation ditches upon the land were provided with water by a ditch, running out of a creek, which was large enough to properly irrigate all the land, and that Wilkinson was actually cutting a hay crop on the land. The decision relied on the rule that "if all has been accomplished upon the land that would be required for final proof of a desert land entry, the land has been *effectually reclaimed.*" (Emphasis added.) In this case the reclamation improvements were of a reasonably permanent nature.

In *Mary Helen Conlan*, A-29398 (1963), the Department affirmed rejection of a Desert Land Act application on the basis that the applicant had already reclaimed the land and therefore it was no longer subject to entry. On appeal the only issue raised was whether or not the land was reclaimed. Two parcels of land were in issue. The evidence showed that the applicant had drilled a well on land adjoining the two parcels, and water from the well was conducted in ditches across one of these parcels and onto the other parcel. Nearly sixteen acres of oats were cultivated on the latter parcel. In her appeal, the applicant stated that there was no pump on the well at that time and the land in both parcels had returned to its desert state. It was held that at the time of application both parcels had been effectually reclaimed so as not to be subject to entry as desert land. The decision concluded that the applicant possessed "the *present means* to bring the land under cultivation" and "the fact that

these means are *presently idle* does not return the land to its desert character." (Emphasis added.) It is important to note that in this case the condition of the well was a matter within the control of the applicant, since she had recently used it to provide irrigation water.

In reaching the conclusion that the lands were effectually reclaimed, the *Conlan* decision also stated the following important dictum: "[T]his is not to say that desert land, having once been reclaimed, cannot revert to a desert land status."

The most recent case in point, *Dorothy A. Strait*, A-30436 (1965), makes clear the usefulness of the distinction between effectual reclamation and reclamation.* The applied-for land had been cultivated in trespass, both before and after the time of application, by the applicant's brother, who had developed a well on his adjoining private land and was using it to irrigate and cultivate the land. Thus, the applicant had no legal control over the water supply, and she contended that the land was not effectually reclaimed because there was no permanent water supply for irrigation. The Department concluded otherwise, stating:

> It would thus appear that a permanent water supply has been developed for this land. The fact that it might not be specifically available to the appellant, which is not completely apparent, does not take away from its being generally a permanent source of water for the land, viewing the situation from the perspective of the one who has reclaimed the land. It would thus appear that the land involved has been effectually reclaimed.

The *Strait* decision is somewhat confusing in its explanation of the permanency of the water supply, but the result makes sense considering the brother-sister relationship and the fact that the brother had continued cultivating the land after his sister applied for it and was continuing to cultivate it at the time of appeal, so that one could properly conclude that the sister was acting as a strawman for her brother and the brother would be the one who would continue cultivation of the land and receive the benefit of a patent. In other words, there was compelling evidence that the land was effectually reclaimed because the applicant would not have to contribute substantially to reclamation.

* Between the *Conlan* and *Strait* decisions there was one other case turning on effectual reclamation which is not discussed because it does not set out the details concerning the reclamation accomplished at the time of application. *David E. Iveson*, A-30058 (1964).

The requirement of permanency of reclamation which is stressed in the *Strait* decision is crucial to our opinion that the Indian Hill lands can be considered as subject to Carey Act disposition.* The lands cannot be considered effectually reclaimed if it is certain that the existing pumping facilities—which are the means to convey irrigation water to the land and are thus an essential part of reclamation as defined in the regulations—will no longer be available for the land and that it will be necessary for the State to undertake substantial reclamation work at least in the form of replacing those facilities.

In summary, effectual reclamation is a matter of degree to be determined keeping in mind the principles of adequate consideration, in the form of necessary reclamation work, for the patent and reasonable promise of permanency in changing the *status* of the land from desert tc agricultural.

* Reclamation must be "by such means as will give reasonable promise of permanence." *ex parte Emma J. Warren*, 8 L.D. 113 (1889). See also Commissioner's Instructions, 4 L.D. 51 (1885); *Wallace* v. *Royce*, 1 L.D. 26 (1882); and references to permanency of required reclamation facilities in the regulations; 43 CFR § 2521.6(f). The requirement of reasonable promise of permanency must be read into the regulation on effectual reclamation. The regulation speaks of land which "*has been* effectually reclaimed," but, as was noted in the *Conlan* decision, *supra*, "this is not to say that desert land, having once been reclaimed, cannot revert to a desert land status."

Assuming that Hoodco will definitely remove the present pumping facilities and that it will be necessary for Idaho to replace them in order to provide irrigation water, we conclude that the Indian Hill lands should not be considered "effectually reclaimed" and therefore should be subject to disposition under the Carey Act.

David E. [Illegible]

Deputy Solicitor

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1-75-22

[Filed Jun. 19, 1975]

STATE OF IDAHO ex rel CECIL D. ANDRUS, Governor; R. KEITH HIGGINSON, Director, IDAHO DEPARTMENT OF WATER RESOURCES; and the IDAHO WATER RESOURCE BOARD, PLAINTIFFS

—*vs*—

U.S. SECRETARY OF THE INTERIOR,
ROGERS C. B. MORTON, DEFENDANT

ANSWER

COMES NOW the defendant, Rogers C. B. Morton, Secretary of the Interior of the United States, by and through the United States Attorney for the District of Idaho, and as and for his answer to the complaint herein, admits, denies, and avers as follows:

FIRST CAUSE OF ACTION

I

Answering paragraph I, admits so much thereof as alleges that the plaintiff, Cecil D. Andrus, is a duly elected Governor of the State of Idaho and that the plaintiff, R. Keith Higginson, is the Director of the Department of Water Resources, State of Idaho, having responsibility for applications and proceedings by the State pursuant

to 43 USC 641, et seq. Defendant denies that the plaintiff Idaho Water Resource Board is an applicant for segregation of lands for construction of a project for reclamation and irrigation of desert lands in Idaho under the Carey Act, but admits that the defendant through his agency, has control and supervision of certain federal lands within the State of Idaho that are desert in character.

II

Answering paragraph II, admits so much thereof as alleges the jurisdiction of this Court by reason of issues of federal law, but denies each and every remaining allegation of said paragraph II.

III

Answering paragraph III, admits so much thereof as alleges that the Bureau of Land Management has notified the plaintiff R. Keith Higginson that it will not allow requests for segregation or withdrawal under the Carey Act as a matter of right, save and except that the defendant denies that any request for segregation or withdrawal under the Carey Act or any application for grant contract has been submitted to the defendant, and alleges affirmatively that the only applications filed by the plaintiffs with respect to the lands alleged to be involved in this case are applications for temporary withdrawal of said lands for possible proposed reclamation projects. The defendant specifically denies each and every remaining allegation in the said paragraph III of plaintiffs' first cause of action.

SECOND CAUSE OF ACTION

I

Answering paragraph I of the second cause of action, admits so much of the aliegation as therein incorporated by reference as has heretofore been admitted in the answer to paragraphs I and II of the first cause of action, but specifically denies each and every remaining allega-

tion of said paragraphs I and II of the first cause of action incorporated by reference into paragraph I of the second cause of action.

II

Answering paragraph II of the second cause of action, admit so much thereof as alleges that the defendant, by and through the Bureau of Land Management, has notified the plaintiffs that the defendant and the Bureau of Land Management will follow directions given to the Bureau of Land Management by a Solicitor's Opinion, dated August 29, 1974, and denies each and every remaining allegation of the said paragraph II of the second cause of action.

III

Answering paragraph III of the second cause of action, alleges and avers that the defendant is without knowledge or information to form a belief as to the truth of the allegations contained in said paragraph III, and accordingly denies the same.

IV

Answering paragraph IV of the second cause of action, admits so much thereof as avers that the plaintiff has filed an application, but denies that the application is for "segregation" of the lands known as Indian Hills, and alleges affirmatively that the plaintiff has applied only for temporary withdrawal of the subject lands, and further alleges that the defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph IV, and accordingly denies the same.

THIRD CAUSE OF ACTION

I

Answering paragraph I of the third cause of action, incorporated by reference paragraphs I and II of the second cause of action, the defendant admits so much thereof as was heretofore admitted in his answer to paragraphs I and II of the said second cause of action, and

expressly and specifically denies each and every remaining allegation not so admitted in the answers to paragraphs I and II of said second cause of action.

II

Answering paragraph II of plaintiffs' third cause of action, admits so much thereof as alleges that the Solicitor's Opinion and the Bureau of Land Management take the position that one house built upon a boundary line between two quarter sections will not establish a valid residence under the Carey Act for both entries, and denies each and every remaining allegation in said paragraph II of the third cause of action.

III

Answering paragraph III of the third cause of action, alleges that the defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and accordingly denies the same.

IV

Answering paragraph IV of the plaintiffs' third cause of action, alleges that the defendant is without knowledge or information sufficient to form a belief as to the truth of the ailegations contained therein, and accordingly denies the same.

AFFIRMATIVE DEFENSE

As and for his further defense to the complaint on file herein, the defendant alleges affirmatively that the first cause of action, the second cause of action and third cause of action alleged in said complaint, and each of said causes of action, so denominated, fail to state a claim or claims upon which relief can be granted.

WHEREFORE, the defendant, having fully answered the plaintiffs' complaint on file herein, prays that the

complaint and action herein be dismissed, and that the defendant recover his costs of action herein.

Dated this 18th day of June, 1975.

/s/ Wilbur T. Nelson
WILBUR T. NELSON
United States Attorney

I hereby certify that a copy of the foregoing Answer was mailed to Nathan W. Higer, Special Assistant Attorney General, Department of Water Resources, State Capitol, Boise, Idaho 83720, plaintiffs' attorney, this 19th day of June, 1975.

/s/ Wilbur T. Nelson
WILBUR T. NELSON

WAYNE L. KIDWELL
Attorney General
State of Idaho
by NATHAN W. HIGER
Special Assistant Attorney General
Legal Counsel, Idaho Department
of Water Resources
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ATTORNEYS FOR PLAINTIFFS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1-75-22

[Filed Aug. 22, 1975]

STATE OF IDAHO ex rel CECIL D. ANDRUS, Governor; R. KEITH HIGGINSON, Director, IDAHO DEPARTMENT OF WATER RESOURCES; and the IDAHO WATER RESOURCE BOARD, PLAINTIFFS

—*vs.*—

U.S. SECRETARY OF THE INTERIOR,
ROGERS C. B. MORTON, DEFENDANT

MOTION FOR SUMMARY JUDGMENT

COMES NOW the Plaintiffs herein, by and through their attorney of record, Nathan W. Higer, and moves this Court for summary judgment.

This motion is based upon the fact that there are no genuine issues of fact to be decided and that as a matter of law the Plaintiffs are entitled to judgment as prayed for in the complaint.

This motion is further supported by the brief filed herewith.

DATED this 21st day of August, 1975.

/s/ Nathan W. Higer
NATHAN W. HIGER
Special Assistant Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 21st day of August, 1975, a true and correct copy of the foregoing MOTION FOR SUMMARY JUDGMENT was mailed, postage prepaid to: Wilbur T. Nelson, United States Attorney, District of Idaho, 698 Federal Building, 550 West Fort Street, Boise, ID 83724.

/s/ Nathan W. Higer
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1-75-22

[Filed Feb. 26, 1976]

STATE OF IDAHO ex rel. CECIL D. ANDRUS, GOVERNOR; R. KEITH HIGGINSON, Director, IDAHO DEPARTMENT OF WATER RESOURCES; and the IDAHO WATER RESOURCE BOARD, PLAINTIFFS

—*vs.*—

THOMAS S. KLEPPE, Secretary of the Interior, DEFENDANT

DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

COMES NOW the Defendant Secretary of the Interior, by and through the United States Attorney for the District of Idaho, and moves the Court for its order, pursuant to Rule 56(b), Federal Rules of Civil Procedure, adjudging that the Plaintiffs are not entitled to the relief requested on the basis of the allegations contained in the complaint on file herein, and adjudging that the complaint and action be dismissed;

On the grounds and for the reasons that the pleadings and record on file herein show that there is no genuine issue as a material fact and that the Defendant is entitled to judgment as a matter of law.

This motion is based on the pleadings and record on file herein, the memorandum in support of motion and in opposition to plaintiffs' motion for summary judgment

filed herewith, and on Rule 56(b), Federal Rules of Civil Procedure.

Dated this 26th day of February, 1976.

MARION J. CALLISTER
United States Attorney

By /s/ Wilbur T. Nelson
WILBUR T. NELSON
Assistant United States Attorney

I hereby certify that copies of the foregoing Defendant's Cross-Motion for Summary Judgment and copies of Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment were served on the following this —— day of February, 1976:

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/s/ Wilbur T. Nelson
WILBUR T. NELSON

SUPREME COURT OF THE UNITED STATES

No. 79-260

CECIL D. ANDRUS, SECRETARY OF INTERIOR, PETITIONER

v.

IDAHO, ET AL.

ORDER ALLOWING CERTIORARI

Filed October 15, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 305570 135

Supreme Court, U. S.
FILED
SEP 20 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

No. 79-260

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
PETITIONER

v.

STATE OF IDAHO, ET AL.

THE STATE OF IDAHO'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of the United States

No. 79-260

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
PETITIONER

v.

STATE OF IDAHO, ET AL.

THE STATE OF IDAHO'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Whether the Carey Act, as amended, 43 U.S.C. § 641, and subsequent enactments, conferred upon the State of Idaho a right of entitlement to three million acres of desert land suitable for irrigation, cultivation and settlement, which Idaho cannot be deprived of if it meets the conditions of the Carey Act and reclaims the desert lands.

STATUTES INVOLVED

The Carey Act of August 18, 1894, Ch. 301, § 4, 28 Stat. 422, 43 U.S.C. § 641, cited fully in the Petitioner's Brief for Certiorari at 2.

The Act of March 15, 1919, Ch. 96, 36 Stat. 237, 43 U.S.C. (1970 ed.) § 643, cited fully in the Petitioner's Brief for Certiorari at 4.

The Act of June 11, 1896, Ch. 420, § 1, 29 Stat. 434, 43 U.S.C. § 642 provides:

> Under any law heretofore enacted by any State providing for the reclamation of arid lands, in pursuance and acceptance of the terms of the grant made in section 641 of this title, a lien or liens is hereby authorized to be created by the State to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers; and when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such State without regard to settlement or cultivation: Provided, That in no event, in no contingency, and under no circumstances shall the United States be in any manner directly or indirectly liable for any amount of any such lien or liability, in whole or in part.

STATEMENT

Respondent accepts in part the statement in the government's petition, but submits the following additional information:

1. *History of the Carey Act*

In addition to the amendatory statutes cited by the government, it is also important that in 1896, just two years following the enactment of the Carey Act, the Congress amended the Act to permit the states to obtain liens against the land being reclaimed for the actual cost

of irrigation systems and reasonable interest. See Act of June 11, 1896, Ch. 420, § 1, 29 Stat. 434, 43 U.S.C. § 642. This subsequent Congressional enactment specifically recognized that the Carey Act had made a *conditional grant* of lands to the states:

> Under any law heretofore or hereafter enacted by any state, providing for the reclamation of arid lands, *in pursuance of and acceptance of the terms of the grant made in Section 641 of this title,* . . . . [Emphasis added] 43 U.S.C. 642.

This intent of Congress that the Carey Act be a grant of lands is evident from the Congressional history of the Act.

The Carey Act was one of several federal programs enacted in the late 1800's to encourage the settlement and reclamation of the vast federal lands in the western United States. Unlike other land grant legislation such as the Desert Land Act, 43 U.S.C. §§ 321-339, Homestead Act, 43 U.S.C. §§ 161-302 and Timber and Stone Act, 43 U.S.C. §§ 311-313 (repealed 1955), in which the federal government dealt directly with each settler, the Carey Act was an effort to involve the individual states in reclamation programs and have them initiate and supervise the settlement of desert lands. It represented a compromise between that faction of Congress that wanted the federal government to control the reclamation and take complete responsibility for the development of the public domain and those advocating an unconditional grant of land to the states. The proponents of the Carey Act felt that given a chance, states working in conjunction with private interests could best accomplish the purpose of reclaiming arid western lands

without federal reclamation laws. 26 Cong. Rec. 8429-8431 (1894). The states were to be given a definite entitlement to the desert lands. However, to avoid speculation and misdealing, the federal government was to retain title until the states had met the conditions of the Carey Act and had actually performed the reclamation work. There was never any doubt that once the states performed their part of the bargain, the federal government was legally obligated to issue patents. The states were protected with a permanent entitlement to lands, but the United States retained the power to refuse to issue patent until the states complied with the terms of the Act and irrigated the lands.

2. *The Case Below*

In both the district court and the circuit court, the Interior Department not only argued that the state had no enforceable entitlement under the Carey Act, it also argued that a married woman could not make her own entry under the Carey Act and that a home built on the dividing line between entries could not qualify as a residence for both entries. Both courts below ruled against the government on these issues, primarily on constitutional grounds. The United States has now decided not to seek certiorari on either of these issues. The petition for certiorari is therefore limited solely to the question of whether the Carey Act granted any enforceable entitlement to the State of Idaho with respect to irrigable desert lands.

In reviewing the decision of the district court, the petition for certiorari failed to disclose that while the courts found that the State of Idaho had an entitlement to 3 million acres of irrigable desert lands, it also did not bar the government from proceeding to classify and use

federal lands which were suitable for Carey Act entry. In fact, the court specifically provided that the Secretary could withdraw lands for valid purposes and that the state's remedy was to request reclassification of the lands for Carey Act entry (Petitioner's Brief for Certiorari, Appendix A at 19a):

> The Secretary is under an obligation to preserve enough desert land suitable for Carey Act development to fulfill the State's right of entitlement, which the Federal Government must contract to donate to the State in accordance with the Act. *To the extent the land has been withdrawn for other purposes by the Secretary and the State remains desirous of initiating a Carey Act development on such acreage, its remedy is to petition the Secretary to reclassify the lands suitable for Carey Act entry.* The Secretary may not arbitrarily deny the State's application for reclassification, withdrawal and Carey Act segregation. The Secretary's ruling, once final, is reviewable under the standards set forth in *Bronken v. Morton,* 473 F.2d 790 (9th Cir. 1973), *cert. denied,* 414 U.S. 828, 94 S. Ct. 51, 38 L.Ed.2d 62 (1973), *Richardson v. Udall,* 253 F. Supp. 72 (D.C. Idaho 1966), and the Administrative Procedure Act, 5 U.S.C.A. § 706. Such a construction of the Carey Act is consistent with 43 U.S.C.A. 315f and its proviso empowering and directing the Secretary to classify the public lands as more valuable or suitable for certain purposes upon application by a qualified applicant. *See, Bleamaster v. Morton,* 448 F.2d 1289 (9th Cir. 1971). The Court does not accept the State's argument that it is absolutely entitled to select *any* land on the public domain for Carey Act development, for such a construction does not comport with the wording of the Act, its legislative history, other acts of Congress regarding the public domain, as

> well as the broad discretion invested in the Secretary of the Interior as manager of the public domain. [Emphasis added]

REASONS FOR DENYING THE PETITION

I

THE NINTH CIRCUIT COURT OF APPEALS AND THE FEDERAL DISTRICT COURT FOR THE DISTRICT OF IDAHO CORRECTLY AND APPROPRIATELY DECIDED THIS CASE

Contrary to the assertions of the United States there is no overriding national policy requiring review of the decisions of the lower courts in this case. The principal effect of the Carey Act is in the Ninth Circuit, and while there are some potentially irrigable lands in the Eighth and Tenth circuits, the issues presented here are predominantly Ninth Circuit issues. *Accord,* Petitioner's Brief for Certiorari at 17.

The United States in the Petition for Certiorari implies that the land amounts sought by Idaho are large and will have a disastrous effect upon the ability of the Secretary to manage the public lands. This is untrue. The decision reached by the Appellate and District Court reflects the goals of the Carey Act as established by Congress. In fact, the Appellate and District Courts reach the central issue avoided by the United States, namely that the administrative plans for the public lands established by the Department of the Interior are contrary to congressional will and interest. That is, Congress through the Carey Act made a conditional grant of lands to the desert land states, which grant is not subject

to defeat by the general desire of the Interior Department not to allow Carey Act entries.

A. The Language of the Carey Act Creates a Grant of Federal Lands to the State of Idaho.

The Carey Act is not a legislative authorization permitting the Secretary of the Interior to make desert lands available for settlement and patent at a future date only if such entries are compatible with recent policy changes within the Interior Department. The Carey Act is by its terms an absolute grant of federal lands to the public land states. The states are invited to accept the grant by contract and to proceed to identify and reclaim the desert lands. If they do so, the Secretary of the Interior is directed to issue a patent to the state. The language of the statute is mandatory and speaks in terms of a grant, which must be performed if the states meet the conditions of the statute:

> [T]he Secretary of the Interior with the approval of the President is, as of August 18, 1894, authorized and empowered upon proper application of the State to contract and agree, from time to time, with each of the states in which there may be situated desert lands . . . *binding the United States to donate, grant and patent to the State free of cost for survey or price such desert lands* . . . .
>
> * * * *
>
> *As fast as any state may furnish satisfactory proof* according to such rules and regulations as may be prescribed by the Secretary of the Interior, *that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the state or its assigns* . . . . [Emphasis added] 43 U.S.C. § 641.

Commentators have noted that the nature of the Carey Act is to create a contract between the federal

government and the states. The Carey Act has been denominated a contractual offer by the federal government to donate and grant certain lands, which offer had to be accepted by the states to become effective. Once accepted, the offer created a contractual obligation binding upon both the state and the federal government. III *Kinney On Irrigation and Water Rights* § 1325 (2d ed. 1912) states:

> *Acceptance of the grant made by the Carey Act by the States named.* The first step to be taken by a State which wishes to avail itself of the benefits of the grant made by the Carey Act of the one million acres of land is to accept the terms of the grant and to provide for the machinery for the reclamation of the land. The power of the State is limited to the acceptance of the offer of the United States, and the execution of the trust assumed by the acceptance thereof. Now this acceptance can only be made by an Act of the legislature, in the exercise of its power, and in order to make such acceptance effective.

The State of Idaho accepted the offer of the federal government in 1895, and a binding contract was created:

> *Idaho Code* § 42-2001. *Acceptance of the Carey Act.* The State of Idaho accepts the conditions of Section 4 of an act of congress, entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1894, and for other purposes," approved August 18, 1894, and the acts amendatory thereof, together with all the grants of land to the state under the provisions of the aforesaid act and its amendments.

The language of the Carey Act, contrary to the petitioner's implication, is unequivocal.

B. The Legislative History of the Carey Act Reveals That Congress Intended to Grant and Donate Desert Lands to the States Conditional Only on the State's Reclamation and Settlement of the Lands.

Contrary to the assertions of the United States, the legislative history and subsequent amendments to the Carey Act established that while an outright grant of possession was not made, the United States did *agree to grant lands to the states* if the states complied with the provisions of the Act and actually reclaimed the lands and placed settlers on the lands.

The Congressional Record reveals that the original Carey Act arose from the adoption of a House amendment replacing an earlier Senate bill introduced on the matter. 26 Cong. Rec. 8388 (1894). A look at the Congressional Record establishes five major points concerning the Carey Act: First, the Senate bill did not constitute an outright appropriation to the states. *Id.* Second, the Senate Bill allowed the states to select desert lands and reserve them for five years, but patent was not issued to the states until they irrigated and reclaimed the lands and located actual settlers upon them. *Id.* Third, the House amendment was adopted and became the original Carey Act. The House amendment is very similar to the Senate bill, but deleted the provisions which allowed the states to reserve the lands for up to five years after selection while they attempted reclamation. *Id.* at 8389. Fourth, the House members were very concerned that title to the desert lands not pass to the states until the lands had been reclaimed and actual settlers located upon them. Since Congress had made outright grants of other lands and had been highly

criticized because of resulting speculation, the House amendment was designed to make certain that title to the land did not pass to the states until the provisions of the Act concerning reclamation and settlement had been met. *Id.* at 8388-8394. Fifth, all of the Congressmen understood that although the states were not getting an outright appropriation of identifiable land, they were being given a "donation" of land, with title to pass upon reclamation of the land by the state and the settlers. There is no discussion whatsoever of discretion being granted to the Secretary. In fact, the Congressmen assumed that the patent to the lands would be delivered promptly to the states as soon as they reclaimed the lands. *Id.*

Further evidence of congressional intent to "donate" lands to the western states is found in the legislative history. Appendix A contains selective portions of that history.

C. Federal and State Courts Have Continually Found That the Carey Act Constituted a Conditional Grant to the Public Land States.

While the United States asserts that the long standing policy of the Interior Department has not changed, the interpretation given to the Carey Act by Federal and State courts is contrary to that now offered by the United States.

This Court in 1923 recognized that the United States had obligated itself to transfer desert lands to the State of Idaho by contract and that the Secretary of the Interior has no discretion to deny patents once the conditions of settlement and reclamation are met.

> By the Carey Act the United States binds itself to donate, grant and patent to a state, complying with stated conditions, desert lands, which the state may cause to be irrigated, reclaimed and occupied. The state is required to file a map of the land proposed to be irrigated, showing the plan of irrigation, etc., and is authorized to make contracts, to cause the land to be reclaimed, and to induce their settlement and cultivation. *Upon satisfactory proof* the Secretary of the Interior *is directed to issue patents* to the State of its assigns. *Idaho Irr. Co. v. Gooding,* 256 U.S. 518, 521 (1923). [Emphasis added]

The Federal District Court for Idaho in 1933 found that the Carey Act constituted a grant of lands to the states to be accepted by complying with the conditions of the Act. *Twin Falls Land and Water Co. v. Twin Falls Canal Co.,* 7 F. Supp. 238 (D. Idaho, 1933). Here the court stated:

> In 1894 by the passage of the Carey Act a new policy to effectuate the reclamation of the desert lands of the arid West was initiated by the Congress. Title 43, USCA, Sec. 641 et seq. By its terms, as an aid to the cultivation of tracts upon such arid regions, the United States *offered to grant to states complying with the requirements* of the enactment, large bodies of desert land. *This statutory offer was formally accepted by the State of Idaho,* which laid down an elaborate and carefully guarded method of procedure for persons desiring to construct such projects and for settlers thereon. 7 F. Supp. at 240. [Emphasis added]
>
> The State of Idaho in its sovereign capacity was interested in the development of prosperous communities upon desert lands within its boundaries. It has adopted a code, intricate in detail and various in

> ramification to protect that resource. Pursuant to this policy and with the beneficient purpose of utilizing this resource upon the "Great American Desert" the legislation, state and national, heretofore adverted to, was enacted. 7 F. Supp. at 245.

Contemporary statements by state jurists also reflect the understanding that the Carey Act constituted a conditional grant to the states. The statements of the Supreme Court of Montana in two early cases demonstrate the public understanding existing in the 1890's that the federal government had indeed granted and ceded desert lands to the states conditioned only on the reclamation of the lands by actual settlers. In *State v. Wright,* 44 P. 89 (Mont. 1896) the Court stated:

> . . . . we are satisfied that the law (Carey Act) is valid. The United States had the power to make the offer to the state, to grant it the lands provided the state would reclaim them. Of this there can be no doubt. . . . . We believe the acceptance was valid. The legislature having accepted the offer, its next right, in the premises, was to provide a detailed method whereby the state could execute the acceptance and make it operative. This they have done. The attitude of the state thereby became that of an agent of the United States, to make effective the offer of the latter to part with its desert lands to the state or its assigns, provided the state can reclaim such lands, and induce the actual settlement and cultivation thereof. This the state has undertaken to make possible by legislation. *If the state fails, the United States will not issue its patents. If the state succeeds, the United States has agreed to pass the title to the state, or its assigns, upon satisfactory proofs of the fulfillment of the requirements of the acts of Congress. Id.* at 92. [Emphasis added]

Two years later, in *State v. Marshall,* 52 P. 268 (Mont. 1898) the same court stated:

> . . . . *The general government has by law made to the state conditionally a magnificent donation of lands.* It is of the highest importance that the legislature of the state should make provision by law for performing the conditions upon which the right of the people to acquire the lands thus donated depends. Our legislature, appreciating this important duty to the people, has been prompt in taking the necessary steps and providing the essential means for acquiring title to the arid lands granted, as said above, to the state. *Id.* at 270.[Emphasis added]

The Montana jurists, who were contemporaries of the Congressmen who enacted the Carey Act in 1894, clearly understood that the Carey Act was much more than a mere authorization to the Secretary of the Interior to permit the patent of desert lands if in his sole discretion he decided that such would be in the best interests of the public. They understood and stated that the Carey Act was a conditional grant or donation of public lands to the states, and that once the states complied with the stated conditions, the federal government was obligated to issue patent.

The government claims the presumption against statutory grants of the public domain. However, that argument is balanced in this case by the rule that land grant statutes are not to be construed so as to defeat the intent of the Congress or withhold a grant that is given by necessary or fair implication. In the *United States v. Denver & Rio Grand R. Co.,* 150 U.S. 1 (1893) this Court stated:

> It is undoubtedly, as urged by the plaintiffs error, the well settled rule of the court that public grants

> are construed strictly against the grantees, but they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given by fair implication. In *Winona & St. P. R. Co. v. Barney,* 113 U.S. 618, 625 . . . . Mr. Justice Field, speaking for the court, thus states the rule upon this subject: "The acts making the grants are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purposes declared on their face, and read all parts of them together. *Id.* at 14.

It has also been held that a land grant statute is to be liberally construed to carry out its purposes. *Great Northern R. Co. v. United States,* 315 U.S. 272 (1942); affirming *McDonald v. United States,* 119 F.2d 821 (9th Cir. 1941).

The language of the Carey Act and the judicial precedent construing that language are both contrary to the position taken by the United States. The grant to the states is clear and absolute and the transfer of title to the states is limited only by the condition that the states comply with the requirements of the Act prior to issuance of patent. None of the opinions support the proposition that the Secretary of the Interior has discretion to arbitrarily deny the Carey Act applications. Once a state has identified desert lands and requested their temporary withdrawal or segregation, the Secretary may not arbitrarily deny the request, but must allow the State to proceed to meet the other requirements of the Act and obtain patent.

D. There is no Long Standing and Consistent Administrative Interpretation of the Carey Act Contrary to the Decisions of the Courts Below.

Petitioner's assertion that the Secretary of the Interior has consistently applied unfettered discretion to decline to enter into contracts under the Carey Act and that such administrative interpretation of the Act is entitled to great deference from the courts is misleading. Actually, the line of department decisions relied upon by Petitioner consists of a single case decided in 1908. That case is not entirely in point. Furthermore, it is well established that the rule of construction applies only to statutes reasonably susceptible of different constructions and that the federal courts are not obligated to follow any administrative decisions that are inconsistent with a statutory mandate or that frustrate Congressional intent. In *Volkswagenwerk v. FMC,* 390 U.S. 261 (1968) this Court stated:

> The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a "reasonable basis in law." . . . . But the courts are the final authorities on issues of statutory construction, ... and "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." . . . . "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia . . . ." (390 U.S. at 272).

See also Houghton v. Payne, 194 U.S. 88, 99 (1904).

The respondent would submit that the statute in question is not reasonably susceptible of different construc-

tions and that any precedent from the decisions of the Department of the Interior are to a large part merely self-serving, inasmuch as the Department has historically attempted to interpret the Carey Act to suit its land development programs and without any express consideration of the rights of the states under the Act. Moreover, examination of Department precedent shows that there is no consistent interpretation of the Act that permits unfettered discretion on the part of the Secretary.

1. *There is only one administrative decision giving limited support to the position of the Secretary of Interior.*

While *State v. Wyoming,* 36 *Pub. Lands Dec.* 394 (1908) does deal with the Carey Act it does not stand for the proposition urged by the Secretary. It does stand for the *limited position* that public lands properly withdrawn prior to the filing of the state's application under the Carey Act are not available to the State and that the Defendant Secretary therefore has authority and discretion to deny such an application. This 1908 administrative decision incorrectly interprets the provisions of the Carey Act and should be disregarded. In any event, the precedent of the decision is limited to those situations in which a *proper withdrawal has been made prior to the Carey Act application.*

A review of the entire body of administrative decisions by the Department of the Interior establishes that the 1908 *State of Wyoming* decision is the only decision holding that the defendant Secretary has any discretion to deny the application by a state for Carey Act lands. There is no authority for any of the following propositions: (1) that the Secretary has discretion to deny Carey

Act applications as to unwithdrawn lands, (2) that the states have no enforceable entitlements, or (3) that the Secretary may arbitrarily refuse to classify desert lands in such a manner as to make them available for Carey Act entry. Contrary to the impression given by the United States, there is almost no precedent within the Department of the Interior dealing with the proper interpretation of the Carey Act and the contractual rights of the states.

Another decision relied upon by Petitioner is *Yakima Development Co. v. Washington,* 34 *Pub. Lands Dec.* 453 (1906). It is not in point. Here the project involved was determined by the Secretary to be not feasible because of the lack of irrigation water and because the state wanted to join the project with a federal reclamation project, assess charges against the lands and use the funds to reclaim other lands. The decision merely holds that when a state's proposal does not meet the requirements of the Carey Act it may be denied. There is no suggestion that the proposal complied with the Carey Act and was denied by the Secretary by reason of discretion. This case illustrates the only type of discretion the Secretary is granted under the Act: administrative discretion to determine whether the statutory requirements of the act have been met. If the requirements are met, then the Secretary must issue patent. *Mollohan v. Gray,* 413 F.2d 349 (9th Cir. 1969).

2. *The regulations of the Department of the Interior support the position of the State of Idaho.*

While the United States has urged that the Secretary has engaged in a long standing practice of exercising "discretion" regarding Carey Act selections, it is interesting to note that the Secretary's regulations did not support this position.

In fact, the *Carey Act Regulations,* 37 *Pub. Lands Dec.* 624 (1909), contain no statements or information of any nature indicating that the Secretary has unlimited discretion to deny a proper application under the Act. To the contrary, the regulations merely recite the provisions of the Act, and specify in detail the information and materials which the states must furnish to comply with the requirements of the Act. The language of the regulations implies that the only function of the Secretary is to make sure that the submittals by the states meet the requirements of the Act: (1) that the land is desert land, and (2) that the irrigation proposal is adequate to irrigate the land. This, in light of the long standing practices of western states, clearly establishes the error of the position of the United States.

II

THE DECISION BELOW DOES NOT PREVENT THE SECRETARY FROM MANAGING PUBLIC LANDS

The government properly recognizes that there is no conflict between the decision below and the decision of any other circuit, and that almost all of the affected public lands lie within the Ninth Circuit. The government has therefore based its petition for a writ of certiorari upon the ground that an important federal question is raised which should be decided by this Court. It attempts to buttress that position by arguing that the decision below will have a severe impact on the Secretary's management of public lands.

The government's argument is insufficient to justify granting certiorari in this case for at least two important reasons. First, the federal question in this case involves the construction of the Carey Act as it pertains to the entitlements of the desert land states to receive public lands. The lands which are affected by the decision lie almost entirely within the Ninth Circuit and, except for the decision in this court in *Idaho Irr. Co. v. Gooding*, 265 U.S. 518 (1923), all of the litigation involving or construing the Carey Act by the federal courts has occurred in the Ninth Circuit. In the absence of conflict between the circuits and in the absence of any showing that the proceedings in the Ninth Circuit have departed from the accepted and usual course of judicial proceedings, there is no reason for this Court to review a case which has been thoroughly and competently decided by the Ninth Circuit in accordance with prior circuit precedent.

Second, the government is incorrect in its argument that the decision below prevents the Secretary from properly administering the public lands. It is true that the decisions of the lower courts provide that the Carey Act and subsequent enactments conferred upon the State of Idaho a right of entitlement to three million acres of desert land suitable for irrigation, cultivation and settlement, which it cannot be deprived of by the Secretary of the Interior if the State meets the conditions of the Carey Act. However, the lower courts expressly recognized that the Secretary was still obligated and empowered to administer the public lands subject to the public land laws and declared that the State of Idaho could not arbitrarily select acreages previously withdrawn for other purposes, without first requesting a

reclassification under public land laws. The district court found that the duties of the Secretary under the Carey Act could be performed in a manner consistent with his obligation to classify and deal with lands in the public interest.

> . . . . the State may not perfunctorily select acreage previously withdrawn for other purposes, such as in this case a withdrawal for stock driveways. The Secretary is under an obligation to preserve enough desert land suitable for Carey Act development to fulfill the State's right of entitlement, which the Federal Government must contract to donate to the State in accordance with the Act. To the extent the land has been withdrawn for other purposes by the Secretary and the State remains desirous of initiating a Carey Act development on such acreage, its remedy is to petition the Secretary to reclassify the lands suitable for Carey Act entry. The Secretary may not arbitrarily deny the State's application for reclassification, withdrawal and Carey Act segregation. . . . . Such a construction of the Carey Act is consistent with 43 U.S.C.A. 315f and its proviso empowering and directing the Secretary to classify the public lands as more valuable or suitable for certain purposes upon application by a qualified applicant. (District Court Memorandum Decision, Petitioner's Brief for Certiorari, Appendix A at 18a-19a.)

To justify the granting of certiorari, the government has raised the specter of all public lands in Idaho and other western states being "frozen" as to use with a resulting administrative burden on the Department of the Interior to classify all lands as to potential use. There is no evidence of any such "freezing" or burden in the record in either court below, and this issue has been raised for the first time to support the government's

petition. The government's claims and fears are not valid. There is no question but that public lands in Idaho will have to be classified as to potential use from time to time, particularly as to their value for agricultural purposes. However, this type of classification is an on-going function and responsibility of the Department of the Interior and will occur regardless of the decision in this case. In fact, the Department of the Interior has itself sharply limited the disposition of public lands in Idaho while it engages currently in an extensive classification of many of the public lands in Idaho.

The decision of the lower courts makes it clear that the Department is entitled to proceed with all such classification programs, and may proceed to make withdrawals and dispositions as required for the public good. Nothing in the decision prevents the Secretary from granting rights under the Desert Land Act or from conveying desert land under the Federal Land Policy and Management Act ("FLPMA"). The only restriction upon the Secretary is that he must preserve enough desert lands in the state of Idaho to meet the requirements of the Carey Act.

The State of Idaho may request segregation of unwithdrawn public lands and may also request reclassification of withdrawn lands. There are well established departmental procedures, with appropriate judicial review, with respect to such reclassification requests. Any conflicts between the entitlement of the State of Idaho to Carey Act lands and the classification and public use of lands by the Department of the Interior under FLPMA can be resolved by administrative and court procedures at the time the conflict arises. The burden is upon the state to ask that the affected lands be reclassified for

Carey Act entry. This will properly focus consideration on the lands and policies involved in the particular case. Such potential disputes are already addressed in the lower court decision and are not a proper ground for granting a writ of certiorari in the instant case. The decision of the district court is not in conflict with the goals of FLPMA but in fact permits exactly the type of classification and development of public lands sought by the government, subject to the protection of the rights of the State of Idaho to receive its Carey Act entitlement.

CONCLUSION

The federal question in this case is confined almost entirely to the Ninth Circuit; there is no conflict between the circuits; and the decision of the lower courts was thorough, competent and correct. The obligation and power of the Secretary of the Interior to administer the public lands was confirmed by this decision. Where conflicts arise between Idaho's Carey Act entitlement and the administration of the public lands, the lower court's decision has established a review procedure. The petition for certiorari should be denied.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this ____ day of September, 1979, three copies of THE STATE OF IDAHO'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI were mailed, postage prepaid, to:

Honorable Wade H. McCree, Jr.
Solicitor General
Department of Justice
Washington, D.C. 20530

and further that all parties required to be served were served.

DAVID H. LEROY
Attorney General
State of Idaho

APPENDIX A

PERTINENT EXCERPTS FROM THE COMMITTEE REPORTS AND A PORTION OF THE HOUSE DEBATE ON THE CAREY ACT

1. *Report of Secretary of the Interior on Senate Bill 1591, March 2, 1894* (26. Cong. Rec. 8390)

The bill is clear and is guarded in its terms. It is in the interest of small settlers. The United States holds the title until the lands reserved are actually reclaimed and settled. The States will have no power over the land except for the purpose of reclamation and individual settlement, as expressed in the bill, while it will clothe the States with authority ample to induce the reclamation and settlement of the reserved lands, especially by colonies, a system which has worked admirably in several of the States to which the bill will apply . . .

The principal proposition involved, reclamation and settlement by individuals in small holdings, meets my strong approval, and this bill seems to me to present full opportunity for the practical experiment and under proper safeguards. *The United States retains title until reclamation is accomplished and the land occupied by actual settlers. This, if successful, is the great object to be attained;* and if unsuccessful the United States still holds the unencumbered fee. [Emphasis added]

2. *House Debate* (26 Cong. Rec. 8391-92, August 10, 1894)

MR. PICKLER (sponsor of the legislation in the House): Mr. Speaker, I do not care to detain the committee further than to state just what the proposition is that the Senate has placed on this bill. There are between five

and six hundred million acres of Government land not yet taken, consisting largely of arid and desert lands. The question has been discussed in the House for many years past as to the best disposition to make of those lands. Now, this is simply a proposition to donate to each of the States that the desert land laws apply to, a million acres of such lands. Gentlemen will understand that we have between five hundred and six hundred million acres of public domain left, and this simply proposes to appropriate thirteen or fourteen millions of these arid lands, giving 1,000,000 acres to each of the States named.

MR. WILSON of Washington: A million acres of lands.

MR. PICKLER: Yes, a million acres of desert lands.

MR. MERCER: Provided there are a million acres of arid lands within the state.

MR. PICKLER: Yes, these lands are doing nobody any good now, and they never will do anybody any good until they are irrigated. This proposition does not cost the Government anything. It simply allows each of these States to take a million acres of these desert lands and see whether or not, under the direction of the State legislatures, they can be irrigated and reclaimed.

MR. MERCER: Do I understand that the substitute offered by the gentlemen from Arkansas (Mr. McCrae) has been framed by the Land Office? (The substitute offered by McCrae was the House amendment which became the original Carey Act.)

MR. PICKLER: Yes, sir. The proposition that is now before the House is one that has been approved by the Commissioner of the General Land Office and I think there can be no objection to it. Gentlemen will remember

how sensitive this House has shown itself from time to time in regard to making direct appropriations for the irrigation and reclamation of arid lands. Now, here is a proposition which costs the Government nothing, *but simply donates these lands to the States, leaving them to bear the burden of irrigation and reclamation.* Furthermore, it is provided that the title to these lands shall not pass to the States until it is shown to the satisfaction of the Secretary of the Interior that the lands have been reclaimed according to law and the money expended upon them. [Emphasis added].

3. *Excerpts of the Debate on the Act of May 27, 1908,* Ch. 200, § 1, 35 Stat. 347, 43 U.S.C. § 645, which gave the State of Idaho an additional one million acres of Carey Act lands:

House Debate (42 Cong. Rec. 6436, May 16, 1908)

MR. FRENCH . . . . The proposition is simply this: To pass this resolution *will grant to the State of Idaho* an additional 1,000,000 acres to be reclaimed under the terms of the Carey Act, which was passed in 1894. The reason for offering this resolution is this: The State of Idaho has practically exhausted the million acres *granted under that act.* Some of this land has already passed to patent; some of it has been settled and patents are pending in the Department . . . .

MR. WILLIAMS. I desire to ask the gentlemen what is the difference between this bill and the bill which we voted down the other day?

MR. FRENCH. The difference between this bill and the bill that was voted down on Monday is this: That resolution *gave to both the States, Idaho and Wyoming,*

2,000,000 acres of land each. This limits *the grant to Idaho* alone and cuts *the grant* in two, making it a grant of 1,000,000 acres. [Emphasis added].

Supreme Court, U. S.
FILED
DEC 11 1979
JR., CLERK

No. 79-260

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OCTOBER TERM, 1979

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PETITIONER

v.

STATE OF IDAHO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 595 F.2d 524. The opinion of the district court (Pet. App. 2a-29a) is reported at 417 F. Supp. 873. The opinion of the Interior Board of Land Appeals (Pet. App. 30a-38a) is reported at 21 I.B.L.A. 210.

JURISDICTION

The judgment of the court of appeals (Pet. App. 43a) was entered on April 19, 1979. Mr. Justice

Stevens subsequently entered an order enlarging the time in which to petition for a writ of certiorari to August 17, 1979, and a petition was filed on August 16, 1979. On October 15, 1979, this Court granted certiorari (A. 32). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Carey Act, 43 U.S.C. 641, requires the Secretary of the Interior indefinitely to reserve from appropriation for other public or private uses some 2.4 million acres of desert land within Idaho for the eventuality that the State may be able and willing to select all or any part of such acreage for irrigation and reclamation under the Act.

STATUTES INVOLVED

The Carey Act of Aug. 18, 1894, ch. 301, Section 4, 28 Stat. 422, 43 U.S.C. 641, and the Act of Mar. 15, 1910, ch. 96, 36 Stat. 237, 43 U.S.C. (1970 ed.) 643, repealed by Section 704(a) of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2792, are set forth at Pet. 2-5.

STATEMENT

1. In order to reclaim and populate arid lands of the West, the Carey Act, Section 4 of the Act of Aug. 18, 1894, ch. 301, 28 Stat. 422, 43 U.S.C. 641, "authorize[s] and empower[s] the Secretary of the Interior with the approval of the President," to con-

tract to grant and patent "desert lands" to any state in which there are such lands, in exchange for the state's agreement, among other things, to cause the land to be irrigated, reclaimed, cultivated, and settled.[1] After a state's application for a grant has been approved, the land is segregated from the public domain for a period of from three to 15 years for the purpose of allowing the state to cause an adequate irrigation system to be constructed and a sufficient water supply to be made available. Upon satisfactory proof that the conditions of the contract have been fulfilled, patents must be issued to the state or its assigns for the land reclaimed.[2] Originally, no state could receive more than one million acres of land for Carey Act development. In 1908, however, Congress raised the ceiling for Idaho to three million acres. Act of May 27, 1908, ch. 200, Section 1, 35 Stat. 347, 43 U.S.C. 645;[3] Pub. Res. 28, 35 Stat. 577; see generally 42 Fed. Reg. 18100 (1977) (proposed Carey Act regulations).

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[1] "Desert land" is land which will not yield an agricultural crop without irrigation. See 43 U.S.C. 322, 641.

[2] The Carey Act requires that the land conveyed to the States be used for actual settlement by individuals. In the Act of June 11, 1896, ch. 420, 29 Stat. 413, 434-435, however, Congress permitted the Secretary to patent land to states prior to actual settlement and cultivation, provided that water had been furnished to the land. This statute also authorized liens against the land prior to patent.

[3] This statute also raised the limitations for Colorado, Nevada, and Wyoming to two million acres.

In 1910, the Secretary was authorized to withdraw desert lands temporarily from the public domain, upon request by a state, but prior to its submission of a formal plan under the Carey Act. Act of Mar. 15, 1910, ch. 96, 36 Stat. 237, 43 U.S.C. (1970 ed.) 643.[4] This legislation was added to prevent speculative filings under entry statutes on land contemplated by a state for a Carey Act project. S. Rep. No. 367, 61st Cong., 2d Sess. (1910); H.R. Rep. No. 662, 61st Cong., 2d Sess. (1910).

No state has reached its ceiling of land permitted under the Act. To date, Idaho has received approximately 600,000 acres of land under the Act. See Report of the Director of the Bureau of Land Management Table 114 (1952) (the most current report on the Carey Act). Most patents under the Carey Act were issued in the early years of this century when ready water sources were more conveniently located to arid land. As water sources became increasingly unavailable to arid lands, new Carey Act projects began to dwindle and by 1952 were all but nonexistent. Recent improvements in technology for pumping water from deep wells and river canyons, however, have revived interest in Carey Act developments.

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[4] After the district court's decision and judgment, this provision was repealed by Section 704(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, 90 Stat. 2792. Section 204 of FLPMA, 43 U.S.C. 1714, however, gave the Secretary general authority to make withdrawals. The Secretary construes his authority under Section 204 to allow him to withdraw public lands from entry pending submission of a formal plan under the Carey Act.

2. In 1974, respondent State of Idaho, invoking Section 643, requested that the Secretary withdraw temporarily a specified tract of 27,400 acres in Idaho pending the State's submission of a proposed development plan under Section 641 (Pet. App. 31a-32a). On January 24, 1975, the Bureau of Land Management rejected the application for a temporary withdrawal because the land had been withdrawn for other purposes including, as to some of the land, stock-driveway purposes (*id.* at 31a, 33a).[5] The State appealed BLM's action to the Interior Board of Land Appeals only with respect to the lands withdrawn for stock-driveway purposes (*id.* at 33a). The State simultaneously petitioned the Board, pursuant to Section 7 of the Taylor Grazing Act, 43 U.S.C. 315f, to classify the tract as suitable for development under the Carey Act (*id.* at 34a).

The State argued that the Carey Act gave Idaho the right to three million acres of public land for Carey Act developments and that this right vested in 1894 when the Act became law and takes precedence over subsequent withdrawals and uses (Pet. App. 36a). Accordingly, the State contended that the Secretary has no discretion under Section 643 to deny

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[5] Under the authority of 43 U.S.C. (1970 ed.) 141; Exec. Order No. 10,355, 17 Fed. Reg. 4831 (1952), the Secretary withdrew the lands in 1955 for driveways for stock. See Act of Dec. 29, 1916, ch. 9, Section 10, 39 Stat. 865, 43 U.S.C. (1970 ed.) 300, repealed and replaced by the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, Sections 204, 704(a), 90 Stat. 2792, 43 U.S.C. 1714; 43 C.F.R. 2313.1(c) (stock driveways).

Idaho's request so long as the lands requested were desert lands (Pet. App. 36a). On July 31, 1975, however, the Board held that Section 641 "is couched in discretionary language authorizing and empowering—not requiring—the Secretary to contract and agree with the states to donate, grant, and patent lands" (*ibid.*). The Board affirmed the refusal to withdraw the lands and directed the petition for classification to the BLM for initial consideration (*id.* at 38a).

3. On February 21, 1975, several months before the Board's decision, the State filed the present action in the United States District Court for the District of Idaho against the Secretary of the Interior. The complaint alleged that the Secretary had notified the State (i) that he would not allow "requests for segregation or withdrawal under the Carey Act as a matter of right" and (ii) that he had the authority to refuse to convey lands under the Carey Act even though they are in fact desert lands and suitable for agricultural use (A. 5-6). The complaint sought a declaratory judgment that the Secretary's policy violated the Carey Act.[6] The Secretary's answer admitted that he would not allow requests for segregation or withdrawal under the Carey Act as a matter of right (A. 24).

On cross motions for summary judgment (A. 28-31), the district court agreed with the Secretary that

[6] The complaint also alleged that another policy of the Secretary concerning the amount of acreage available to a family violated the Act (A. 6-22). The courts below decided this issue against the Secretary, and the Secretary did not seek certiorari on this issue (see Pet. App. 28a).

the Carey Act did not make a grant in praesenti to the State, and that the State did not have a right to select any particular desert lands for Carey Act development (Pet. App. 18a). The court, however, concluded that the Carey Act "conferred upon the State of Idaho a right of entitlement to three million acres of desert land suitable for irrigation, cultivation and settlement" and that the Secretary must preserve enough desert land to satisfy this right (*id.* at 18a-19a; emphasis added):

> The State is guaranteed a maximum entitlement of three million acres of suitable desert land for Carey Act development to select from time to time, which it cannot be deprived of by the Secretary of the Interior, if the State meets the conditions of the Carey Act. However, the State may not perfunctorily select acreage previously withdrawn for other purposes such as in this case a withdrawal for stock-driveways. *The Secretary is under an obligation to preserve enough desert land suitable for Carey Act development to fulfill the State's right of entitlement, which the Federal Government must contract to donate to the State in accordance with the Act.*

The court also held that if the State is denied an application for land for Carey Act development because that land has been withdrawn for some other use, the State's remedy is to petition the Secretary to open that land for Carey Act development, and that the Secretary's decision, once final, is reviewable in the courts (*id.* at 19a).

The district court entered a judgment against the Secretary that "ordered, adjudged and declared" that Idaho "is entitled to have withdrawn and patented three million acres of the desert lands in the public domain (as reduced by prior patents issued pursuant to the Carey Act) situate in the State of Idaho for entry under said Act, providing that there are sufficient lands of such kind, quality and character within the State of Idaho, and providing that the State of Idaho satisfies all of the terms and conditions of said Act * * *" (Pet. App. 40a). The Secretary and the State both appealed. On April 19, 1979, the Ninth Circuit affirmed in a one-sentence opinion (*id.* at 1a).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Secretary objects to that portion of the judgment of the district court declaring that the State has an entitlement to an additional 2.4 million acres and that the Secretary must hold for eventual disposition under the Carey Act approximately 2.4 million acres of unappropriated desert lands.

Our submission is that the Carey Act establishes no entitlement to any public lands. The Carey Act merely "authorize[s] and empower[s]" the Secretary of the Interior, in his discretion and subject to the approval of the President, to enter into contracts to grant desert land to the states upon the condition that they reclaim it. The Act does not require the Secretary and the President to grant the maximum acreage authorized for each state. The plain language of the

statute is permissive, not mandatory, and is thus different from the unmistakable language used by Congress in making grants of public lands to other statutes. Moreover, the legislative history is quite clear on this point. The congressman who introduced the language on behalf of the House conferees stated on three separate occasions in the House of Representatives that the Act "does not make any grant, but only authorizes the Secretary of the Interior with the approval of the President to make a contract * * * for the reclamation of not exceeding a million acres in each State" or words to this effect. 26 Cong. Rec. 8391, 8431 (1894). Finally, the consistent administrative interpretation has been that acceptance or rejection of a contract offered by a state under the Act "is a matter wholly within the discretion of the Department." *State of Wyoming*, 36 Pub. Lands Dec. 399 (1908). This settled construction by the agency charged with administering the Act is sufficiently contemporaneous with its enactment that it is dispositive of any residual doubt concerning the meaning of the Act.

ARGUMENT

I. The Plain Language of the Carey Act Shows That It Established No Entitlement to Public Lands

The decisive language of the statute is permissive —not mandatory. The Secretary is "authorized and empowered" to contract to grant desert land to the state upon certain conditions. To "authorize" administrative action is not to require that it be taken. See, *e.g.*, *INS* v. *Bagamasbad*, 429 U.S. 24, 26 (1976);

Anderson v. *Yungkau*, 329 U.S. 482, 485 (1947); *Creek Nation* v. *United States*, 318 U.S. 629, 639 (1943); *United States* v. *Wilbur*, 283 U.S. 414, 418-419 (1931); *Farmers Bank* v. *Federal Reserve Bank*, 262 U.S. 649, 662-663 (1923). That Congress used "authorized" in the permissive sense is all the more apparent from the fact that the Act uses the mandatory "shall" in connection with other responsibilities under the statute (Pet. 3-4).[7]

Other features of the Act confirm our interpretation. Congress in the same breath used the word "binding" to describe the contract. It is clear that the contract, once made, was to be binding, but, equally clearly, the Secretary was given discretion whether or not to enter into such a contract in the first place. Had the statute itself created a binding right to arid lands, it would have been unnecessary to provide for any contract. The Secretary, moreover, may grant "not exceeding" three million acres to the state. Had Congress intended to confer an inchoate right to three million acres, subject only to the availability of "suitable" land, Congress would have qualified the acreage with a proviso such as "to the extent such lands are available" rather than the phrase "not exceeding."

[7] As the Court said in *Anderson, supra*, 329 U.S. at 485:

> The word "shall" is ordinarily "the language of command." *Escoe* v. *Zerbst*, 295 U.S. 490, 493. And when the same Rule uses both "may" and "shall," the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory. See *United States* v. *Thoman*, 156 U.S. 353, 360.

"Not exceeding" reflects discretion to grant less than three million acres even where the statutory conditions are met.

Furthermore, the President must "approve" all contracts under the Act. No criteria, however, are specified to guide the President. Inasmuch as it is unlikely that the President's approval was required simply to confirm the Secretary's factual determination that the statutory requirements are met, the provision for the President's concurrence must have been intended to insure that, considering all relevant factors of public policy, release of the land is in the public interest.

The plain language of the statute thus defeats any claim of right to select up to three million acres of suitable desert land. Certainly, there is nothing in the Carey Act that overcomes the presumption against statutory grants of the public domain. See *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 617 (1978).[8]

II. The Legislative History of the Carey Act Demonstrates That Congress Intended No Entitlement to Public Lands

a. By 1875 it was apparent that virtually all of the public lands in the West blessed with readily accessible water had been settled, chiefly under the

[8] For other examples of statutes in which Congress used express granting language, see 43 U.S.C. (1970 ed.) 934, 946, 962, 966; 43 U.S.C. 857, 858, 982, 983. Contrast these with, *e.g.*, 43 U.S.C. (1970 ed.) 956, 957, 959, 961, in which Congress used the words "authorized and empowered" to give discretionary authority to the Secretary.

Preemption Acts and the Homestead Act of 1862, ch. 75, 12 Stat. 392. P. Gates, *History of Public Land Law Development* 637-638 (1968) (hereafter "Gates"); B. Hibbard, *A History of the Public Land Policies* 144-170, 347-409, 424-426 (1939) (hereafter "Hibbard"). Yet vast reaches of desert and arid lands remained unreclaimed, unsettled and unproductive. At the same time, Western rivers, swollen annually by the melting mountain snows, flowed uninterrupted to the sea. One solution to this anomaly was to divert sufficient water to irrigate the deserts. Western interests, galvanized by "irrigation conventions" held throughout the West, increasingly urged Congress to undertake and to promote reclamation projects. See Gates at 635-654; Hibbard at 424-429; and note 12, *infra*.[9]

One obvious obstacle to reclamation effort, however, was its substantial cost. Reluctant to undertake the cost at national expense, Congress at first attempted to rely on private capital to finance irrigation projects. The Desert Land Act of 1877, 43 U.S.C. 321, was the first general reclamation statute.[10] It authorized immediate entry by individuals on up to 640 acres (later 320 acres) of desert lands (defined as lands exclusive

[9] As early as 1869 Utah asked for public lands to be used in promoting irrigation projects. Cong. Globe, 40th Cong., 3d Sess. 781 (1869).

[10] In 1875, a statutory experiment for disposing of desert land in Lassen County, California, provided that unsurveyed tracts not to exceed a section would be sold to certain settlers who should undertake to irrigate and reclaim it within two years. Act of Mar. 3, 1875, ch. 160, 18 Stat. 497.

of timber and mineral lands which will not, without irrigation, produce some agricultural crop) and the eventual sale to them upon proof of irrigation of the land.

Unfortunately, although a considerable amount of acreage was entered under the Desert Land Act, little was actually irrigated and patented. *Annual Report of the Commissioner of the General Land Office* 8 (1884); Hibbard at 428. A major difficulty was that ordinarily it was not possible for a single settler to finance the construction of canals and pipes over long distances and hills merely to water a small tract. Collective action and expensive capital outlays were necessary to take advantage of the Desert Land Act. See Gates at 651-652. The Act also invited many abuses. Hibbard at 428-430. For example, numerous filings under the Act by speculators who had no intention of irrigating it during the three-year period allowed for installing irrigation ditches set aside millions of acres of land that might otherwise have been settled. Large economic groups and land speculators, it has also been contended, used the Act to acquire title to the best of the arid lands with little or no serious effort to irrigate them and, with title in hand, turned their efforts to obtaining federal or state aid to finance irrigation works. Gates at 647-648.

As the difficulties under the Desert Land Act mounted, the Western States stressed two further solutions to the problem of reclamation. One was for the federal government to plan and to finance large-scale reservoirs and irrigation projects and to sell

the reclaimed land to settlers.[11] It was also proposed that the federal government cede all or virtually all public lands to the States so that the States could provide for the prompt reclamation of the land. Gates at 647-651.[12] Eventually, at the urging of President

[11] In 1888, Congress withdrew from entry or sale all public lands designated by the Geological Survey as suitable for reservoirs, canals or susceptible to reclamation by irrigation. Act of Oct. 2, 1888, ch. 1069, 25 Stat. 527. All such lands were later restored to entry in 1890 save those sites suggested by the Geological Survey for reservoir sites. Act of Aug. 30, 1890, ch. 837, 26 Stat. 391; see Hibbard at 430-431; Gates at 641-642.

[12] In support of this proposal, Representative Lanham stated in his report in 1892 for the Select Committee on Irrigation of Arid Land on an unsuccessful bill to give virtually all public lands to the western states:

> [T]he people of [the western] States and Territories, recognizing the prevailing sentiment and realizing fully all the difficulties which encompass the situation, have reached the conclusion that the General Government will never [undertake to reclaim the arid lands]. They despair of any such prospect.
>
> It would prolong this report too much to attempt an elaborate and detailed review of all the National Government has already done, the labor and money it has expended, the investigations it has conducted, the explorations it has made, the reconnaissances it has projected, the differentiations of irrigable lands it has disclosed, and the useful information and scientific *data* it has furnished in relation to the subject of irrigation and the reclamation of arid lands.
>
> It has maintained bureaus. It has employed experts. It has made surveys, topographic and hydrographic. It has measured rainfall. It has gauged streams. It has defined catchment and drainage areas. It has located reservoir sites. It has investigated storm waters and their utilization, torrential flows and their conservation, the waters upon the earth and the waters under the earth, conditions of climate, the best methods of cultivating the soil by irrigation, and the agricultural results and possibilities which follow. It has even bombarded the skies and sought through explosives to wring waters from the reluctant clouds. * * *
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> * * * * *
>
> Why should the Government desire to longer retain proprietorship of this arid region? Why, for that matter, should it now have a vast domain of unappropriated public land? It only holds lands as a trustee and until they can be suitably settled and occupied, and is presumptively interested only to the extent that actual, bona fide settlers may be accommodated. It is not supposed that it wants to retain them in order that they may be donated to corporations or given away as subsidies.

H.R. Rep. No. 569, 52d Cong., 1st Sess. 3-4 (1892).

Theodore Roosevelt, an advocate of reclamation and conservation, Congress undertook a program of federally managed and financed reclamation in the Reclamation Act of 1902 (also known as the Newlands Act), ch. 1093, 32 Stat. 388.[13]

b. The Carey Act was enacted in 1894 when the further usefulness of the Desert Land Act seemed in doubt. The problem and policy alternatives were described in 1894 in a report of the House Committee on Irrigation of Arid Lands on a bill to require surveys for possible federal reclamation:

> There are three ways in which to [reclaim the arid lands.] [O]ne is to conduct the work

[13] The statute authorized the Secretary of the Interior to use receipts from the sales of public lands and to withdraw lands from entry as necessary for the construction of irrigation works.

under the authority and direction of the National Government; another is to transfer these lands to the States in which they are situated, under certain restrictions, looking to the protection of the homesteader, but leaving the duty of reclaiming the land and protecting the settler to the State. The other is to leave the whole question to private enterprise, trusting that combinations of capital will construct canals and reservoirs, and furnish the settler with water at such rates as will enable him to prosper.

* * * * *

* * * Those who have had no practical experience in an arid country will readily understand that one who owns the water, with an unrestricted right to charge the owner of the land for its use, is the complete master of the situation. Farmers who have been buying water of syndicates owning canals have been in a state of constant turmoil from the first. While they have been unable to pay the prices charged for water, it is a fact that in most instances those who have constructed canals and ditches have realized but little out of their investment.

* * * * *

* * * These facts make it evident that either the nation or the State should at once take charge of the settlement and reclamation of these lands. It is probable that a majority of the settlers, perhaps owing to past experiences, favor national reclamation. They are afraid that the expenditure of the large sums of money necessary to reclaim the land situated in different States would result in debauching legislatures, if not

in materially injuring the financial credit of the States interested, even if it were found that all of the new States were equal to the task imposed.

There is, however, a very strong sentiment in the West favoring the gift by the General Government of these lands to the States wherein they are situated. But it is probable that this sentiment arises from the prevalent belief that the Government will not undertake the work of reclamation.

H.R. Rep. No. 1152, 53d Cong., 2d Sess. 3 (1894).

On April 17, 1894, Senator Carey of Wyoming, on behalf of the Committee on Public Lands, reported S. 1591 to the Senate. S. Rep. No. 332, 53d Cong., 2d Sess. (1894). This measure would not have gone so far as to cede all public lands to the states but it would have permitted each State covered by the Desert Land Act to select up to one million acres of surveyed desert lands for reclamation. Upon selection, the land would have been immediately reserved from entry by operation of the statute. Patents would have been issued upon subsequent proof of reclamation. The right of selection and reservation would have been subject to a reversion to the United States to the extent such lands were not reclaimed within five years. See S. Rep. No. 332, 53d Cong., 2d Sess. (1894).[14] The Senate approved the bill on July 18, 1894. 26 Cong. Rec. 7613 (1894); see 26 Cong. Rec. 8123 (1894). The House referred the Senate bill to the House Committee on Irrigation of Arid Lands,

[14] The text of S. 1591, as passed by the Senate, is reprinted in the Appendix, *infra*.

26 Cong. Rec. 7751 (1894). That committee, however, never reported the bill to the House.[15]

c. Senator Carey, desiring prompt passage so that the legislatures of the affected states could enact enabling legislation during the coming winter sessions, moved on August 2, 1894, that the same bill be enacted as an amendment to an appropriations bill pending in the Senate. 26 Cong. Rec. 8123 (1894). The Senator advised the Senate that "[t]here must be something done in the arid-land States and Territories" and that "the Treasury of the United States will [not] be in a condition for some years to come where the Government would be willing to appropriate money for the reclamation of lands in the arid States and Territories (*ibid.*). He regarded his bill as "an experiment" under which "[n]o one can lose anything" because "title of not an acre of land [would pass] out of the Government until its reclamation, and then upon the actual payment and the actual disposal of the land to the settler" (*ibid.*). His amendment to the appropriations bill was adopted by

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[15] On August 2, 1894, Senator Carey advised the Senate that "I understand a favorable report has been agreed upon by the Committee on Irrigation in the House of Representatives." Although members of the House Committee may have informally endorsed the measure, we can find no formal report. See Superintendent of Documents, *Catalogue of the Public Documents of the Fifty-Third Congress (Mar. 4, 1893 to June 30, 1895)* 153, 296-297 (1896). That committee's only report on the subject of irrigation in that Congress was on a bill to provide for further surveys of lands and estimates of national reclamation. H.R. Rep. No. 1152, 53d Cong., 2d Sess. (1894) (see pages 15-17, *supra*).

the Senate without further debate (26 Cong. Rec. 8123 (1894)).

The appropriations bill had already passed the House when Senator Carey's amendment was adopted. 26 Cong. Rec. 3155 (1894). The amended bill then went to the conference. The House conferees were unfamiliar with the public-land issues implicated by the Senate amendment and "concluded that it was the better plan to bring it back to the House so that gentlemen with a fuller understanding of the land systems of the United States might have an opportunity to make known their objections to the legislation" (*id.* at 8388 (Rep. Sayers)). Before the full House, Representative Pickler of South Dakota moved that the House recede and accept the Senate amendment (*ibid.*). Representative McRae of Arkansas, however, on behalf of the House conferees moved as a substitute for that motion "that the House conferees be instructed to strike out the Senate amendment and insert" different language (*ibid.*). The substitute language proposed by the House conferees differed markedly from the Senate amendment, among other ways, in that it eliminated the right of selection. Representative Pickler, although "prefer[ing] the measure reported by the Senate," withdrew his motion and adopted McRae's motion for a substitute. The House then considered whether to substitute the House conferees' language for that of the Senate amendment (*id.* at 8389). Significantly, it was the substitute offered by Representative McRae that was finally passed as the "Carey" Act.

Representative McRae explained the differences between the Senate amendment and the House substitute and stated on three separate occasions during the debate on the two conflicting proposals that the House proposal would not make any grant (26 Cong. Rec. 8391, 8431 (1894); emphasis added):

> Now, Mr. Speaker, I want to state briefly what I understand to be the main difference between the two propositions. *The Senate proposition makes a reservation outright for the States and will make it possible for the States to put a million of acres in each State in reservation for an indefinite period.* It leaves the question of irrigation to be determined under rules and regulations to be made by the States themselves. In short, the States will decide whether they have complied with the conditions as to irrigation. *The pending proposition does not make any grant, but only authorizes the Secretary of the Interior with the approval of the President to make a contract with any States in which any of these lands may be situated for the reclamation of not exceeding a million acres in each State, the question of irrigation to be finally determined by the Executive officers of this Government.* No reservation or withdrawal is permitted except for temporary purposes until the plan is approved; and no title is to pass until thorough irrigation is accomplished and shown to the satisfaction of the Interior Department.
>
> If an experiment of this sort is to be made I desire to put around it all the conditions and limitations necessary to insure the irrigation of the land. This will give ample power to the

> Secretary to secure it. As the gentleman from South Dakota has said there are five or six hundred million acres of desert land—land worthless without irrigation, and very valuable with it. The United States owns the lands, but has no inclination to enter upon its reclamation. We want settlers upon all our public lands. This is simply an experiment by which it is proposed to aid the States in their efforts to reclaim the land, by remitting the price and cost of survey. We charge the individual settler $1.25 an acre for desert land when irrigated. One of the conditions of this measure is that not exceeding 160 acres shall be sold by the State to any one individual.
>
> * * * * *
>
> *If this substitute be adopted it will only authorize contracts which will lapse in ten years after their date. It is not a legislative grant; it does not require any action of Congress for its forfeiture. It does not even put the land in a state of reservation until a map is filed and the plan of irrigation is approved.*
>
> Mr. Speaker, I repeat what I stated yesterday —that I am opposed to legislating upon appropriation bills. This proposition ought to be considered by the proper committee of this House, and subjected to the same treatment as other measures are under our rules; but as it has been attached by the Senate to one of the most important of the great money bills of this House which must be acted upon by us, I think it should at least be fairly discussed and properly understood. The Senate amendment is in my judgment extremely dangerous, and should not be adopted.

[Only] yesterday I pointed out some of the objections to it, but since the gentleman from South Dakota has abandoned it and is satisfied to adopt the substitute which I offered, it is not now necessary to discuss it further. I would prefer to see no legislation at this time and in this way, but if the question can not be postponed for a more careful consideration then we should proceed with all the caution and care that is possible under the circumstances, for the legislation is important and far reaching. The amendment does not appear to be understood by some who have opposed it. It has been likened to the swamp-land grant of September 28, 1850.

That was a grant *in presenti* and passed the title as of the date of the grant. *This is no grant at all, but only gives authority to the Secretary of the Interior and President to make contracts binding the United States to donate the land to the States when reclaimed.* That act passed the title to the whole of the swamp and overflowed lands which were unfit for cultivation and unsold at that time to the States.[16] This grants nothing and authorizes no conveyance until reclamation.

No members of Congress disagreed with these statements. Representative McRae's substitute was adopted by the House as an instruction to the conferees (26 Cong. Rec. 8436 (1894)). The conference then adopted the House substitute in the final enactment. 28 Stat. 422. These clear-cut statements set forth above by the sponsor of the statutory language in ques-

[16] Rev. Stat. 2479-2484, 43 U.S.C. 982-986.

tion establish beyond question that Congress did not intend to grant any entitlement to public lands.[17] Congress only went so far as to authorize the Secretary and the President to grant public lands under the Act.

To be sure, the House debate contains comments that suggest out of context that an outright "grant" to the states was intended. Thus, some legislators referred ambiguously to "the proposition" or "the question" before the House as involving a "grant," or "gift" of arid lands to the States (26 Cong. Rec. 8392, 8398, 8419, 8420 (1894)). In context, however, it is evident that such loose language was the product of a ventilation of fundamental issues of reclamation policy—a debate that transcended the differences between the Senate amendment and the House substitute. By the mechanism of an appropriations-bill rider, the Senate had placed before the House a fundamental concept—cession of public lands to the States—that the House had not previously considered. In these circumstances, the House could hardly be expected to confine its discussion to only the differences between the Senate amendment and the proposed substitute. The broader question was whether the United States should donate land to the states under any circumstances. Both opponents and advocates of the general scheme of cessions to the states thus advanced argu-

[17] The district court erroneously suggested Representative McRae was an opponent of the House measure. See Pet. App. 12a.

ments that went to the larger issues, ignoring the differences in the two measures.[18]

In this context, it is evident that the occasional allusions to "grants" and "donations" were not in-

[18] Thus, Representative Bretz complained that cessions would lead to the same abuses that had befallen cessions under the swamp-land acts (26 Cong. Rec. 8421 (1894)), that the chief advocates of the cessions to the States were "the land syndicates of the West * * * who expect to hold still more [land] if they can get Congress to cede the lands to the States" (*id.* at 8422), that, in any event, the States could ill-afford to finance suitable projects (*id.* at 8421). Representative Cannon of Illinois felt the issues were of too much importance to be considered in "hasty legislation" and that the matters should be referred to "one or more of the great committees of this House * * *" (*id.* at 8392). On the other hand, Western legislators stressed the need for reclamation of arid lands of the benefits that would flow from reclamation (*id.* at 8393-8394, 8427-8429), that the proposal would give to the States only land that was then worthless (*id.* at 8419), that state authorities were better situated to develop arid lands than federal authorities (*id.* at 8423), although Representative Kem of Nebraska argued that federal development and financing of reclamation works were preferable to state development because private interests would obtain control from the states over the available water and require settlers to pay exorbitant rates (*id.* at 8397-8398).

Moreover, it is clear in context that most of the references to "the proposition" as "granting", "donating", or "ceding" desert lands to the states were made with regard to the Senate amendment rather than the proposed House substitute because the speaker either stated that he was commenting on the Senate proposal (26 Cong. Rec. 8391 (1894) (Pickler); *id.* at 8420-8421 (Hepburn)) or because he referred to the requirement that the State expend at least $3 per acre for reclamation, a requirement that was only in the Senate amendment (*id.* at 8421, 8422 (Bretz); *id.* at 8427 (Newlands)).

tended as precise comments on the meaning of the first sentence of the House substitute that "authorized and empowered" the Secretary of the Interior to enter into contracts for the donation of land. These broader comments were not intended to modify the very precise observations of the sponsor of the language at issue here that "[t]his is no grant at all, but only gives authority to the Secretary of the Interior and President to make contracts binding the United States to donate the land to the States when reclaimed" (26 Cong. Rec. 8431 (1894)).

d. It will be said that, even if there is no absolute grant, the Secretary, as the district court held, must manage public land so as to leave sufficient desert land to allow Idaho to eventually acquire three million acres. It is true that no statement in the legislative history explicitly addresses this precise point. In 1894 that there was so much unappropriated desert land[19] and reclamation was in such demand that it would have been unrealistic to entertain the idea the Secretary would disapprove any well-conceived plan under the Act. Nonetheless, Congress plainly realized that not all lands selected by the State would be approved by the Secretary. The whole point in deleting any right of selection was to make it clear that the Act was "no grant at all, but

[19] In 1894, the Commissioner of Lands estimated that there were 529,000,000 acres of available desert lands in 12 western states affected by the Act. The Carey Act concerned only 12 million acres. See S. Rep. No. 332, 53d Cong., 2d Sess. 4 (1894).

only [gave] authority to the Secretary of the Interior and President to make contracts * * *." 26 Cong. Rec. 8431 (1894). Authority to approve applications necessarily implies authority to disapprove applications, even at the risk of falling short of the statutory ceiling. Had Congress intended to confer an entitlement to the statutory maximum it would have been natural in these circumstances to say so.

That Congress did not intend to establish any floating entitlement to desert lands is also evident in its decision not to impede reclamation under the Desert Land Act. In 1894 it was possible for settlers to acquire all of the reclaimable desert lands in a state by entries under the Desert Land Act, carried through to patent. The Secretary had no authority to withdraw desert lands from such entry.[20] Had Congress intended to preserve indefinitely a million acres of desert lands for each state for Carey Act projects, it would have been necessary to withdraw desert lands from entry under the Desert Land Act. Representative McRae, however, stated that his substitute would not "in the least interfere with individuals who may wish to proceed under" the Desert Land Act (26 Cong. Rec. 8432 (1894)).

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[20] The President had authority to reserve public lands from entry or selection. See *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 467 (1915). But, except for the establishment of Indian and military reservations, the power had been rarely used before enactment of the Pickett Act in 1910, 43 U.S.C. (1970 ed.) 141.

Similarly, even though federal reclamation projects were not immediately foreseeable in 1894, Congress had authorized surveys for such projects in anticipation of their eventuality (see page 14, note 11, *supra*). Federal reclamation projects would have eventually depleted the supply of arid lands available for Carey Act projects through the use of such lands for reservoirs and the sale of formerly arid lands so irrigated. It is inconceivable that in 1894 Congress meant to establish an entitlement that years later would prevent federal reclamation projects because it might usurp the State's "entitlement" under the Carey Act.[21]

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[21] In fact, by 1908 the Secretary of Interior began to disapprove Carey Act applications on the ground that they overlapped with applications under the Desert Land Act or national reclamation projects and such disapprovals were discussed in Congress without objection. When Representative Gaines of Tennessee asked Representative French of Idaho to explain why the Secretary had not granted all Carey Act applications, Representative French replied (42 Cong. Rec. 6437 (1908)):

> The reason is this: We have a national reclamation law under which lands are being reclaimed; we have the Indian reservation law; we have lands that have passed into private ownership under the desert-land act and other laws. Sometimes it happens that an application for segregation under the Carey Act overlaps one or more of these propositions or tracts of land. The Department sometimes finds it necessary to spend several months inquiring of the engineers in the field or the local land-office officials to ascertain whether or not the segregation overlaps.

III. Contemporaneous Construction By The Secretary And Subsequent Legislative History Demonstrate That No Entitlement To Public Lands Was Intended

Regulations issued by the Secretary in the wake of the Carey Act provided the types of information required to be submitted with Carey Act applications and advised that applications could be rejected. See General Land Office, *Regulations Concerning the Selection of Desert Lands under the Act of Congress Approved August 18, 1894*, 37 Pub. Lands Dec. 624 (1909). Even earlier, moreover, the Secretary had expressly held that he could deny an application based on "the best interests of the whole people." *Yakima Development Co.* v. *State of Washington*, 34 Pub. Lands Dec. 453, 455-456 (1906); *State of Wyoming*, 36 Pub. Lands Dec. 399 (1908).

The State argues that the *Yakima* case is not in point because the Department refused to enter into a contract with the State only because it was not satisfied that there was sufficient water to carry out the reclamation plan.[22] A full reading of the decision shows, however, that the grounds for refusing to allow the application were broader than this. After considering the extent of water resources available

[22] One of the authorities relied on by the State (Br. in Opp. 8) cites the *Yakima* and *Wyoming* decisions for the statement that acceptance of State applications "is a matter wholly within the discretion of the Land Department." III *Kinney on Irrigation and Water Rights* 2402-2403, n.10 (2d ed. 1912).

to implement the reclamation plan, the Secretary proceeded to consider the State's proposal that its Carey Act project be consolidated with a federal reclamation project:

> Not only are grave doubts entertained as to the legality of such procedure, but it is not thought *as a matter of administrative policy* that this Department would be justified in approving this very complicated, questionable, and *perhaps* impracticable scheme * * *.
>
> The Secretary of the Interior is charged by section 441 of the Revised Statutes with the supervision of the public business relating to the public lands. * * *
>
> Under *all* the circumstances of this case, *looking to what is conceived to be the best interests of the whole people, and in the exercise of the discretion thus vested in the Secretary of the Interior*, I must decline to enter into the proposed contract with the State * * *.

34 Pub. Lands Dec. at 455-456 (emphasis added).

The *Wyoming* decision in 1908 stated the same position so clearly that there could be no doubt:

> It is clear from the terms of the act of August 18, 1894, * * * that the acceptance of the offer of the State is a matter *wholly within the discretion of the Department.* The filing of the application is preliminary to the formation of a contract between the State and the United States. It is manifest that the formation of such contract depends upon the acquiescence of both parties

> thereto without a right in either to insist upon a proffer or acceptance by the other.

36 Pub. Lands Dec. at 399 (emphasis added).

This construction—which has never previously been questioned in any litigation—by the agency charged with the principal responsibility for "regulating the acquisition of rights in the public lands" is entitled to considerable deference. *Andrus* v. *Charlestone Stone Products Co., supra,* 436 U.S. at 613-614; *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965); *Cameron* v. *United States,* 252 U.S. 450, 460 (1920). Significantly, when Congress amended the Act several times after the Interior Department decisions cited above were issued, it did not disapprove Interior's interpretation.[23] We may conclude that the Secretary

[23] See, *e.g.,* Joint Resolution (S. J. Res. 51, 60th Cong., 1st Sess.), approved May 25, 1908, 35 Stat. 577, authorizing grants of an additional one million acres to the State of Idaho. Act of May 27, 1908, ch. 200, Section 1, 35 Stat. 347, 43 U.S.C. 645, authorizing grants of an additional one million acres to the State of Idaho and the State of Wyoming; Act of Feb. 18, 1909, ch. 150, Section 1, 35 Stat. 638, 43 U.S.C. 646, extending the provisions of the Carey Act to the States of Arizona and New Mexico; Act of Feb. 24, 1909, ch. 178, Section 1, 35 Stat. 644, 43 U.S.C. 647, extending the provisions of the Carey Act to the former Ute Indian Reservation in Colorado, Act of Feb. 16, 1911, ch. 900, 36 Stat. 913, extending the provisions of the Carey Act to the former Fort Bridger Military Reservation in Wyoming; Act of Mar. 4, 1911, ch. 285, Section 1, 36 Stat. 1417, 43 U.S.C. 645, authorizing grants of an additional one million acres to the State of Nevada; Joint Resolution (S. J. Res. 34, 62d Cong., 1st Sess.), approved August 21, 1911, 37 Stat. 38, 43 U.S.C. 645, authorizing grants of an additional one million acres to the State of

was not violating his statutory mandate. See, *e.g.,* *Saxbe* v. *Bustos,* 419 U.S. 65, 74 (1974); *Board of Governors* v. *First Lincolnwood Corp.,* 439 U.S. 234, 248 (1978); *United States* v. *Rutherford,* No. 78-605 (June 18, 1979), slip op. 8-9.

Subsequent legislative history confirms that Congress understood, even though it sometimes used the word "grant" loosely, that the Carey Act was not a grant at all. In considering legislation that increased the statutory ceilings in the amounts of land that could be used for Carey Act projects, for example, Representative Mondell of Wyoming observed that:

> The use of the word "grant" in this legislation is somewhat of a misnomer. There is no absolute grant of land contemplated. There is a law—the Carey Act—under which the Secretary of the Interior, if anyone of the States having arid lands assures him that a certain area of land can and will be irrigated, may temporarily withdraw these lands for the purpose of their irrigation. That experimental law, when it was passed, limited the area to a million acres in each state.

Colorado; Act of Feb. 14, 1920, ch. 74, 41 Stat. 407, 43 U.S.C. 644, giving a preference right of entry under other laws to settlers on failed Carey Act projects; Act of Jan. 6, 1921, ch. 10, 41 Stat. 1085, amending 43 U.S.C. 641, giving the Secretary of the Interior discretion to extend the period of segregation or to restore lands to the public domain upon failure of the state to construct the necessary reclamation works.

42 Cong. Rec. 6100 (1908). Representative French also explained that the administrative procedure under the Act required advance approval by the Secretary (*id.* at 6436).[24]

Congress was well aware in the early days of the Act that the Secretary had disapproved a large number of Carey Act applications. By 1908, of approximately 2.72 million acres applied for by States, the Secretary had approved only 1.08 million acres for Carey Act projects (and only approximately 200,000 acres had actually been patented). 42 Cong. Rec.

---

[24] Representative French explained (*ibid.*; emphasis added):

> The reclamation under the Carey Act is done in this manner: The whole body of the million acres is not given en bloc to the State, but rather when individuals or when a company makes application to the State for the purpose of developing an irrigation project—the location of the irrigation canal, reservoir sites, or dams—they submit to the State a proposition with their bid, setting forth the manner of acres that they propose to reclaim, the total amount of money that they will ask for putting in the irrigation work, and the amount per acre which they will charge to the individual settlers.
>
> The State land board then passes upon this application. If the State land board grants it, it indorses the application and applies to the Department of the Interior. *The Department of the Interior then passes upon the question, the feasibility of it, the reliability of the company, the character of the work, and the land that will come under the irrigation canal. If the Department approves the project, it so notifies the State, and the State is authorized to enter into a contract with the individuals or company for the reclamation of the land by the building of the approved system of irrigation works.*

6100 (1908) (Report of Secretary of Interior to House Committee on Irrigation of Public Lands). As Representative French explained (see note 21, *supra*), one reason the Secretary had disapproved Carey Act projects was that the same lands were being considered for federal reclamation under the Reclamation Act of 1902 or the Desert Land Act. See also H.R. Rep. No. 2904, 56th Cong., 2d Sess. 1 (1901); S. Rep. No. 1020, 60th Cong., 2d Sess. 2 (1909); H.R. Rep. No. 1915, 60th Cong., 2d Sess. 2 (1909).

IV. This Court's Decision in *Idaho Irrigation Co.* v. *Gooding* Does Not Support The Holding Below

The district court did not offer any specific basis for its conclusion that the Secretary is obliged to preserve enough land in each state to meet the maximum statutory limits for Carey Act developments. The court evidently placed some reliance on this Court's statement in *Idaho Irrigation Co.* v. *Gooding*, 265 U.S. 518, 521 (1924), that "[b]y the Carey Act the United States *binds itself* to donate" desert lands to states. This, however, was not even a dictum and was simply part of a brief statement of the background of *Gooding*. The Court in *Gooding* plainly did not intend to address the issue presented by our petition, and in any event did not clearly contradict our position.

Gooding was brought by individuals who had purchased water rights (and corresponding shares of stock) from a company formed for the purpose of reclaiming land under the Carey Act. This water

was provided by the company's irrigation project and the individuals sued to prevent the company from selling additional rights since, as they claimed, the project could not supply sufficient water. The Court ultimately agreed and prevented the sales of additional rights. While the Court had cause to mention generally the scheme of the Carey Act (see 265 U.S. at 521), the Court gave no consideration to the issue presented here.[25]

---

[25] The other authorities relied on by the State are likewise inapposite. *State* v. *Wright*, 17 Mont. 565, 44 P. 89 (1896), was an action brought by a commissioner of the state arid land board, which administered the state's duties under the Carey Act, against the state treasurer. The treasurer claimed that he lacked authority to register the warrant for the commissioner's salary. The Supreme Court of Montana held to the contrary, and ordered the warrant registered. That decision had no relevance to the issue here. *State* v. *Marshall*, 20 Mont. 510, 52 P. 268 (1898), was brought by the state attorney general against the arid land board, attacking the board's proposal for a Carey Act project. The board desired to permit the company building the irrigation system for the project to build a larger system than was necessary for the public arid lands, and sell water to a railroad for its arid lands which were "checkerboarded" with the public land. The court found no objection to this project. Although these decisions do allude to the Carey Act as a conditional "offer" that could be "accepted" by the States, the allusion was merely part of a background discussion of the facts of the case. These cases presented no occasion from the Montana courts to consider the extent to which, if at all, the Secretary most indefinitely keep available lands for Carey Act projects. *Twin Falls Land & Water Co.* v. *Twin Falls Canal Co.*, 7 F. Supp. 238 (D. Idaho 1933), was a complicated action brought by a company which built an irrigation system for a Carey Act project, against the company which ultimately operated the project. The construction company would have profited if the operating company could have sold any additional rights to water from the project, and it claimed that the operating company was improperly withholding that water from sale. The operating company prevailed in its claim that there was insufficient water. The language quoted by Idaho (Br. in Opp. 11), that the Carey Act was an "offer" by the United States which was "accepted" by the State was an aside and was only pertinent to the decision as an explanation that the state had enacted a mechanism for fulfilling its role under the Act.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 1979

APPENDIX

Senate amendment introduced by Senator Carey on August 2, 1894 (26 Cong. Rec. 8123):

> That to encourage the reclamation of arid lands, and the cultivation and sale thereof in small tracts to actual settlers, there is hereby reserved for the purposes and upon the conditions provided in this section in each of the States to which the desert-land law of the United States is applicable, and to each of the States of Nebraska and Kansas, and to each of the States that may be formed out the Territorities of Arizona, New Mexico, Oklahoma, and Utah, 1,000,000 acres of the surveyed public arid lands in said States, respectively, to be selected by each of said States within ten years after the passage of this act, and such reservation to take effect from the date of such selection and approval and be thereafter withheld from other disposal, except as hereinafter provided: *Provided*, That any lands so reserved which shall not be reclaimed within five years from the date of their selection and approval as aforesaid, or as to which the State has not expended or caused to be expended the sum of $3 per acre in works intended for the reclamation of such lands, as now required by the United States desert-land law from claimants thereunder, shall be released from such reservation and become subject to disposal as other public lands of the United States after proclamation by the President so declaring.

> That any State accepting the conditions of this section is hereby authorized to make all necessary regulations governing the manner or extent of the reclamation, and to make all contracts to cause said lands to be so reclaimed and settled and cultivated by actual settlers in accordance with such regulations; and as rapidly as the State may furnish competent proof that any of said lands are reclaimed and occupied by actual settlers, in accordance with its said regulations, patents shall issue to the State or its assigns for said lands so reclaimed and settled: *Provided*, That said States shall not sell or dispose of more than 160 acres of said lands to any one person, and the net proceeds derived by each State from the sale of said lands shall be held and expended as a separate fund to aid the work of reclaiming the lands so reserved by this section, and the surplus, if any, shall be devoted by the State to reclaiming other arid lands in said State.
>
> That all lands, exclusive of timber lands and mineral lands, which will not, without irrigation, produce some agricultural crop, shall be deemed arid lands within the meaning of this section, which fact shall be ascertained by affidavit of two or more credible witnesses, filed in the land office of the district in which such land may be situated at the time of the selection thereof, as herein provided: *Provided*, That this section shall not be construed to authorize the leasing of the lands selected or the disposal or use of them by the States, respectively, in any way whatever except to secure their reclamation, cultivation,

and settlement; and the Commissioner of the General Land Office shall, subject to the approval of the Secretary of the Interior, make all rules and regulations necessary to carry out the provisions of this section and to enable the Secretary of the Interior to examine any of the lands that may be selected under the provisions of this section, there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, $1,000.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 306188 148

Supreme Court, U. S.
FILED
JAN 14 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-260

CECIL D. ANDRUS, SECRETARY
OF THE INTERIOR,

Petitioner,

vs.

STATE OF IDAHO, ET AL.

BRIEF FOR THE STATE OF IDAHO

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In The

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No. 79-260

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CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,

Petitioner,

vs.

STATE OF IDAHO, ET AL.

—o—

BRIEF FOR THE STATE OF IDAHO

—o—

QUESTION PRESENTED

Whether by enacting the Carey Act, 43 U. S. C. § 641 (1976), Congress made its own judgment that upon complying with the statutory reclamation conditions, the desert land states were entitled to receive public lands for use by individual citizens, or whether Congress intended to leave the issue of entitlement to public lands to the unlimited discretion of succeeding secretaries of the Interior.

—o—

STATUTES INVOLVED

The Carey Act of August 18, 1894, ch. 301, § 4, 28 Stat. 422, 43 U. S. C. § 641 (1976), cited fully in the Petition for Certiorari at 2-4.

The Act of March 15, 1910, ch. 96, 36 Stat. 237, 43 U. S. C. (1970 ed.) § 643 (repealed 1976), cited fully in the Petition for Certiorari at 4-5.

The Act of June 11, 1896, ch. 420, § 1, 29 Stat. 434, 43 U. S. C. § 642 (1976), cited fully in Idaho's Brief Opposing Certiorari at 2.

—o—

STATEMENT OF THE CASE

Respondent accepts in part the statement in the Government's brief, but submits the following additional information:

1. History of the Carey Act

It is important to examine closely the 1896 amendment to the Carey Act which the Government mentions briefly in a footnote. (Brief for Petitioner at 3, n. 2). Just two years following the enactment of the Carey Act, the Congress amended the Act to permit the states[1] to obtain liens

1 The Carey Act defines the states to which it applies as those "[s]tates in which there may be situated desert lands as defined by the [Desert Land Act] . . ." 43 U. S. C. § 641 (1976). The Desert Land Act states that "[a]ll lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crops, shall be deemed desert lands. . . ." 43 U. S. C. § 322 (1976).

against the land being reclaimed for the actual cost of irrigation systems and reasonable interest. Act of June 11, 1896, ch. 420, § 1, 29 Stat. 434, 43 U. S. C. § 642 (1976). This subsequent Congressional enactment specifically recognized that the Carey Act had made a *conditional grant* of lands to the states:

> "Under any law heretofore or hereafter enacted by any State, providing for the reclamation of arid lands, *in pursuance and acceptance of the terms of the grant made in Section 641 of this title. . . .*" 43 U. S. C. § 642 (1976). (Emphasis added.)

Five years later, in 1901, the Carey Act was again amended to extend the time within which the irrigation and reclamation of suitable desert lands could be accomplished. Act of March 3, 1901, ch. 853, 31 Stat. 1188, 43 U. S. C. § 641 (1976)[2]. The Secretary of the Interior supported this amendment, stating that without it "the states will not receive the full quota of the lands intended to be granted." 34 Cong. Rec. 3295 (1901). This intent of Congress that the Carey Act be a grant of lands is evident from the Congressional history of the Act.

The Carey Act was one of several federal programs enacted in the late 1800's to encourage the settlement and reclamation of the vast federal lands in the western United States. Unlike other land grant legislation such as the Desert Land Act, 43 U. S. C. §§ 321-339 (1976), Homestead Act, 43 U. S. C. §§ 161-302 (1976) and the Timber and Stone Act, 43 U. S. C. §§ 311-313 (repealed 1955), in which the

2 The result of this amendment was to allow a full period of ten years in which to complete the irrigation and reclamation of lands, dating from the segregation of the lands rather than from the original date of the Carey Act. The Secretary was also given discretion to extend this time period an additional five years.

federal government dealt directly with each settler, the Carey Act was an effort to involve the individual states in reclamation programs and have them initiate and supervise the settlement of desert lands. It represented a compromise between that faction of Congress that wanted the federal government to control the reclamation and take complete responsibility for the development of the public domain and those advocating an unconditional grant of land to the states. The proponents of the Carey Act felt that given a chance, states working in conjunction with private interests could best accomplish the reclaiming of arid western lands without federal reclamation laws. 26 Cong. Rec. 8429-8431 (1894). The states were to be given a definite entitlement to the desert lands.[3] However, to avoid speculation and misdealing, the federal government was to retain title until the states had met the conditions of the Carey Act and had actually performed the reclamation work. There was never any doubt that once the states performed their part of the bargain, the federal government was legally obligated to issue patents. The states were protected with a permanent entitlement to lands, but the United States retained the power to refuse to issue patent until the states complied with the terms of the Act and irrigated the lands.

---

3 Idaho's entitlement is important because the state has a total land area of 52,933,000 acres, of which 63.7% or 33,722,000 acres are owned by the federal government. Of the land owned by the federal government in Idaho, 32,912,000 acres are public domain lands of which 11,498,000 are unappropriated and unreserved. Bureau of the Census, U. S. Dep't. of Commerce, *Statistical Abstract of the United States* 237, 239 (99th ed. 1978).

2. The Case Below

In both the district court and the court of appeals, the Interior Department not only argued that the state had no enforceable entitlement under the Carey Act, it also argued that a married woman could not make her own entry under the Carey Act and that a home built on the dividing line between entries could not qualify as a residence for both entries. Both courts below ruled against the Government on the second and third issues, primarily on constitutional grounds. The United States did not seek certiorari on either of these issues. The issue before this Court is therefore limited solely to the question of whether the Carey Act granted any enforceable entitlement to the State of Idaho with respect to irrigable desert lands.

In reviewing the decision of the district court, the Government failed to disclose that while the district court found that the State of Idaho had an entitlement to 3 million acres of irrigable desert lands, it also did not bar the Government from proceeding to classify and use federal lands which were suitable for Carey Act entry. In fact the district court specifically held that the Secretary could withdraw lands for valid purposes and that the state's remedy was to request reclassification of the lands for Carey Act entry (Petition for Certiorari, Appendix A at 19a).

———o———

INTRODUCTION AND SUMMARY OF ARGUMENT

The basic issue before this Court is whether the Carey Act created enforceable rights in the desert land states or whether the Act was only a grant of discretionary authority to the Secretary of the Interior. Any decision on this issue must look to the Congressional policy behind the Act, unanimous contemporary understanding of the purpose of the Act, and administrative implementation of the Act.

The language of the statute is mandatory and not permissive. It provides that:

> "As fast as any State may furnish satisfactory proof . . . that any of said lands are irrigated, reclaimed, and occupied by actual settlers, patents shall be issued to the State or its assigns. . . ." 43 U. S. C. § 641 (1976).

Because the authority granted in the Carey Act has not been used by the states in recent years until new irrigation technology made it possible to irrigate large new tracts of desert lands, almost all of the legislative history, judicial commentary, and scholarly commentary about the act occurred near the turn of this century when the states were actively reclaiming land under the Act. This contemporary legislative history and comment by those most familiar with the Act uniformly establishes the understanding that the Carey Act granted enforceable rights to the desert land states. In 1923, this Court summarized the common understanding of the scope of the Carey Act when it stated:

> "By the Carey Act, *the United States binds itself to donate, grant, and patent to a state, complying with stated conditions,* desert lands, which the state may cause to be irrigated, reclaimed and occupied." *Idaho Irr. Co. v. Gooding,* 265 U. S. 518, 521 (1923). (Emphasis added.)

The legislative history of the Carey Act, together with contemporary commentary by judges and treatise authors, compel the same conclusion reached by the district court: Congress reached a compromise between those who favored outright grant of federal lands and those who favored continuing federal ownership. The lands were to be granted and conveyed to the states, but not until the states had complied with two reclamation conditions, irrigation and settlement. Once those conditions were met, the lands were to be granted and conveyed to the states. The grants were not to occur as a result of—nor were they to be conditioned upon—administrative decision-making. The decision to grant the land upon satisfaction of the congressionally specified conditions was made by Congress. It was not left to periodic changes in policy over the succeeding decades as new Interior Secretaries came and went.

The Government relies on the rule of statutory construction that interpretations of a statute by the administrative agency charged with its enforcement are entitled to deference. It is equally well established, however, that the administrator may not bootstrap an interpretation of the statute favorable to himself, but contrary to the legislative purpose and history. More importantly, in this case, the factual predicate for the rule asserted by the Government is missing: there has been no "consistent administrative interpretation" granting to the Secretary unfettered administrative discretion. To the contrary, as late as 1901, a Secretary of the Interior familiar with the

actual operation of the Act, in commenting on a proposed amendment to the Carey Act, specifically recognized that the Act constituted a grant to the desert land states:

> "The result [of the 10 year limitation] is that the States will not receive *the full quota of the lands intended to be granted, nor will the purposes of the act be anything like accomplished* unless the limitation with respect to time be so changed that the period of ten years shall commence to run in each instance from the date of the segregation instead of from the date *of the original granting act. . . .*
>
> If this amendment is adopted, the result will be that each State affected can from time to time obtain segregations of arid lands *under this grant until the full amount of 1,000,000 acres is obtained. . . .*"[4] 34 Cong. Rec. 3295 (1901). (Emphasis added.)

The record clearly establishes that Congress intended —and the Secretary of Interior agreed—that the Carey Act conditionally granted desert land to the western states for the purpose of helping those states reclaim their arid lands with bona fide settlers.

---

4 Letter dater February 9, 1901, to Chairman of the Committee on Public Lands, United States Senate, 34 Cong. Rec. 3295.

ARGUMENT

I.

The Carey Act grants Idaho contractual entitlement of desert land.

No serious student of the Carey Act, whether jurist or commentator, has ever claimed that Congress intended merely to provide the Secretary of Interior with an unlimited discretion to determine whether states would ever receive any lands under the Carey Act. To the contrary, legislators, jurists, and commentators alike have recognized in the Carey Act a binding obligation on the part of the United States to patent desert lands to the western states once the land has been irrigated and reclaimed for settlement purposes.

The Carey Act is unlike any other land-grant statute and must be understood as compromise legislation seeking to accomplish a specific purpose. Historically, Congressional grants of public lands have either been (1) *in praesenti* grants of specific parcels of land or the right to select specific parcels of land; or (2) grants of discretionary authority to the Secretary of the Interior to dispose of public lands when the Secretary deemed transfer appropriate. Examples of the latter type of authority are the Homestead Act, 43 U. S. C. §§ 161-302 (1976), and Desert Land Act, 43 U. S. C. §§ 321-339 (1976), in which the Secretary is authorized, but not obliged, to open public lands to settlement.

The Carey Act does not fit neatly into either category of public land grants. It is instead a contractual grant of an entitlement to public lands upon the performance of stated conditions. It was enacted as the result of Congres-

sional disagreements as to the best method of bringing western desert lands under productive irrigation. Desert lands easily irrigated by a single owner had largely been taken up by homesteaders in the late 1800's, and by 1894 the only way to bring irrigation water to remaining western lands was through large and expensive irrigation systems. One approach to the problem was to have the federal government fund and construct reclamation and irrigation systems, but Congress was reluctant to expend the necessary funds. 26 Cong. Rec. 8432-33 (1894); III *Kinney on Irrigation and Water Rights.* Sec. 1314 (2d ed. 1912) ("Kinney", hereafter). Another approach was to make an outright grant to the states and let them fund the irrigation systems. But Congress had made outright grants to the states before and had been strongly criticized for resulting fraud and land speculation. 26 Cong. Rec. 8422-24 (1894). Nevertheless, Congress had to decide the issue because there was great need in the western states to irrigate more land.

The compromise reached by the Carey Act was for the United States to contract with each of the desert land states to grant them up to 1,000,000 acres of desert lands for reclamation purposes.[5] The states were authorized to

5 The compromise nature of the Carey Act is discussed in detail in a contemporary history by B. Hibbard, *A History of the Public Land Policies* 434-439 (1924) (1965 reprint). Professor Hibbard describes the nature of the Carey Act as follows:

> "Two years later, 1894, a compromise measure was brought forward. It provided neither for cession outright to the states, nor for direct action by the United States. There was comparatively little debate in either

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select the lands, design and implement large irrigation projects, bring the lands under irrigation, and then distribute the lands to actual settlers in parcels of 160 acres or less. 43 U.S.C. § 641 (1976); 26 Cong. Rec. 8391-92 (1894). To safeguard the land against speculation, the states were not given an *in praesenti* grant of title. Before the states could receive title to the land, they had to actually irrigate and reclaim the land and have it settled by individual farmers. However, once reclamation and settlement were completed and the state had performed its part of the contract, then the United States agreed to deliver to the state a clear title to the land. *Id.* By the very terms of the Act, the United States agreed to issue patents to the states "as fast as any State may furnish satisfactory proof . . . that any of said lands are irrigated, reclaimed and occupied by actual settlers. . . ." 43 U.S.C. § 641 (1976).

The Carey Act differs from other land grant statutes in that it constitutes a contract between the federal government and the states which hold the desert lands. The Carey Act has been denominated a contractual offer, accepted by the states, binding the United States to donate

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> House of Congress accompanying the passage of the bill, but the respective committees on public lands apparently gave the measure much care and thought.
>
> This measure, which passed in August, 1894, is known as the Carey Act, in honor of Senator Carey of Wyoming, . . . Under this Act *the government agreed to donate* to certain states a quantity of land, not over 1,000,000 acres each, which they should cause to be settled, irrigated, and, in part, cultivated; in which even *the government agreed to grant patents either to the state or direct to the assignees of the state." Id.* at 436. (Emphasis added.)

and grant lands. This offer, once accepted by the state, created a contractual obligation binding the federal government. The foremost treatise on irrigation and water rights states the issue clearly:

> "Acceptance of the grant made by the Carey Act by the States named.—The first step to be taken by a State which wishes to avail itself of the benefits of the grant made by the Carey Act of the one million acres of land is to accept the terms of the grant and to provide for the machinery for the reclamation of the land. The power of the State is limited to the acceptance of the offer of the United States, and the execution of the trust assumed by the acceptance thereof. Now this acceptance can only be made by an Act of its legislature, in the exercise of its power, and in order to make such acceptance effective." Kinney, Sec. 1325.

In 1895, the State of Idaho formally accepted the offer of the federal government and a binding contract was created:

> "Acceptance of the Carey Act.—The State of Idaho accepts the conditions of section 4 of an act of congress, entitled 'An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1894, and for other purposes,' approved August 18, 1894, and the acts amendatory thereof, *together with all the grants of land to the state under the provisions of the aforesaid act and its amendments.*" Idaho Code, § 42-2001 (1977). (Emphasis added.)

Similar legislative acceptances of the offer to grant federal lands were enacted in each of the other desert land states.[6]

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6 Every statute (except Montana and South Dakota) accepting the offer of the United States made in the Carey Act has

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The legislative history of the Carey Act is discussed in Section III. From the statements of those who enacted this legislation, from the language they used, and from the comments of scholarly contemporaries, it is clear that Congress itself made the judgment that within the quantity limits specified by the statute (3 million acres in Idaho's case), lands would be conveyed to any state that complied with the irrigation and reclamation conditions. That was not a policy judgment that was left to future Secretaries of the Interior. It was made by Congress itself. If Congress had intended to leave that judgment to the

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referred specifically to the "grants of land" made under the Carey Act: Arizona: Ariz. Rev. Stat. § 37-701 (1974) (originally enacted 1912 Ariz. Sess. Laws, ch. 96, §§ 1, 2); California: Cal. Gen. Laws Ann. act 6283, § 1 (Deering 1944) (originally enacted 1915 Cal. Stats, ch. 613 p. 1140) (repealed 1949 Cal. Stat., ch. 941, p. 1716); Colorado: Colo. Rev. Stat. § 36-3-101 (1973) (originally enacted 1895 Colo. Sess. Laws, p. 157); Montana: Mont. Rev. Codes Ann. § 81-2101 (1947) (originally enacted 1905 Mont. Laws, ch. 105, § 1) (repealed 1963 Mont. Laws, ch. 147, § 242; 1965 Mont. Laws, ch. 280, § 22) (An early acceptance also appears at Mont. Codes Ann. § 3530 (1895)); Nevada: Nev. Rev. Stat. § 324.020 (1973) (originally enacted 1911 Nev. Stat., Part 1:76); New Mexico: N. M. Stat. Ann. § 7-4-1 (1953) (originally enacted 1909 N. M. Laws, ch. 102, § 1) (repealed 1976 N. M. Laws, ch. 27, § 1); Oregon: Or. Rev. Stat. § 555.010 (1977) (originally enacted 1909 Or. Laws, ch. 226, § 1) (this statute again accepted the conditions of the Carey Act earlier accepted in 1901 Or. Laws, p. 378); South Dakota: S. D. Comp. Laws, Vol. I, p. 862 (1913) (originally enacted 1909 S. D. Sess. Laws, ch. 79) (subsequent history not available); Utah: Utah Code Ann. § 65-3-1 (1953) (originally enacted 1901 Utah Laws, ch. 56, § 1); Washington: Wash. Rev. Code Ann. § 79.48.010 (1962) (originally enacted 1895 Wash. Laws, ch. 166, § 1, p. 452) (repealed 1977 Wash. Laws, ch. 12, § 1); Wyoming: Wyo. Stat. § 36-7-101 (1977) (originally enacted 1895 Wyo. Sess. Laws, ch. 38, § 1).

Secretary of the Interior, it would have said so. Instead, the Act creates a binding obligation upon the United States to patent the lands described once the reclamation conditions are met. Neither the language of the statute, nor the legislative history, nor the comments of contemporary jurists or treatise authors recognize an administrative discretion with power to supersede the congressional judgment that lands would be conveyed once the reclamation conditions were met.

II.

The plain language of the Carey Act shows the establishment of an entitlement to desert lands.

For reasons discussed in Section III, Congress clearly intended by adoption of the Carey Act to make a conditional grant of irrigable desert lands. The grant was not subject to any administrative decision. It was subject only to irrigation and settlement, the two conditions specified by the statute. As fast as these two conditions were met, the Secretary was to patent the lands.

The Government (Brief for the Petitioner at 9-11) attempts to find support in the "plain language" of the statute for secretarial discretion to override the obligation to patent. The Government's position concerning the statutory language will not withstand analysis. The Carey Act describes the Secretary's duties in the plainest possible words and these words leave no room for secretarial discretion with respect to contracting to patent land to the states. A reading of the entire text of the Carey Act statute reveals that Congress clearly understood the difference between mandatory and directory legislation and intended the Carey Act to give the desert land states enforceable rights to irrigable desert lands. Following are some of the indicators of the congressional mandate found in the statute itself:

(1) The statute uses mandatory language in several instances and states that: "*patents shall be issued* to the State," as fast as the state furnishes proof of irrigation, reclamation, and settlement. 43 U. S. C. § 641 (1976).

The carefully limited language of discretion of the statute and amendments underscores the intent of Congress to place the Secretary in a position to verify that the conditions of the grant were met by the states.

The only administrative discretion provided by the statute concerns the manner of making proof of reclamation and settlement. Once proof of reclamation and settlement has been made, however, patents must issue. On that substantive question, the decision was made by Congress and there is nothing left for the Secretary or anyone else to decide.

(2) The statute grants the Secretary rule making power only as to the *manner* of making proof of compliance with the conditions of the statute:

> "As fast as any State may furnish satisfactory proof *according to such rules and regulations as may be prescribed by the Secretary of the Interior,* that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued. . . ." 43 U. S. C. § 641 (1976). (Emphasis added.)

If the Congress had intended that the Secretary have total discretion as to whether the states were to receive any

desert lands at all, the Congress would have granted him broad rule-making power over the entire Carey Act process. Instead, the Secretary was specifically limited to making rules governing the *procedures* to be followed in making reservations[7] and furnishing proof of reclamation.

(3) The statute expressly grants the Secretary the power "in his discretion [to] restore such lands to the public domain" if reclamation works are not commenced by the state within three years (or any approved extensions).[8] If the Secretary had the broad discretion he now claims, why did the Congress feel it necessary to grant him discretionary power in this specific instance. Such a limited grant of discretion argues strongly against the overall discretion claimed by the Government.

(4) The Carey Act was amended in 1909[9] to add Section 647 to extend the terms of the Act to different lands within part of the former Ute Indian reservation in Colorado. However, the 1909 Act specifically excluded the segregation of any land that "has valuable improvements,

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7 Prior to passage of the Federal Land Policy and Management Act of 1976, the Carey Act had a provision respecting the Secretary's rule making power as to the states' filing for a reservation of lands under the Carey Act:

> ". . . the Secretary of the Interior may make necessary regulations for the reservation of the lands applied for by the States to date from the date of the filing of the map and plan of irrigation . . ." 43 U. S. C. § 641 (1970). This particular language in § 641 was stricken by the Federal Land Policy and Management Act of 1976, Pub. L. No. 95-579, Title VII, § 704 (a), 90 Stat. 2792 (1976).

8 43 U. S. C. § 641 (1976).

9 Act of February 24, 1909, 35 Stat. 644, 645, 43 U. S. C. § 647 (1976).

or which [has] been reserved for any Indian schools or farm purposes." Such an express statutory limitation in a subsequent amendment demonstrates a Congressional understanding that the Carey Act was a mandate granted to the states by its terms and that a specific exclusion was required if certain lands were to be removed from the operation of the Act. If the Congress had understood that the Secretary of Interior had absolute discretion over the allowance of Carey Act lands, it would not have felt it necessary to limit the lands subject to the segregation claims of the states.

Within the limits of the English language it would be difficult to state any more clearly the Congressional judgment that patents were to issue as fast as any state furnished satisfactory proof that the lands had been irrigated, reclaimed and settled. Nevertheless, the Government places support for its decision in three statutory phrases: (1) The Act "authorizes" the Secretary to enter into contracts, (2) The Act granted "not exceeding" 3 million acres in Idaho's case, and (3) The President must "approve" all contracts. None of these statutory features is inconsistent with the Congressional purpose that is so overwhelmingly clear from other parts of the statute and its history.

Use of the word "authorized" is really neutral on the issue. Authorization would be necessary in the event of either Congressional intent to leave discretion to the Secretary, or to require him to issue patent as fast as irrigation and reclamation conditions were met. "Not exceeding" 3 million acres is merely a recognition of the limitations of the grant and of the reality that the states might not be able to identify irrigable lands and satisfy the conditions

of the full statutory authorization. Indeed, to date none has. Finally, the requirement of Presidential approval argues neither for nor against Secretarial discretion. Approval would be appropriate in either case, in order to ensure that the state had in fact met the conditions prescribed by Congress.

In short, the three features of the statute relied upon by the Government are consistent with either Secretarial discretion, or Secretarial obligation to patent as fast as irrigation and settlement are proven. To determine which of these policies Congress in fact selected, other parts of the statute and its history must be consulted.

The Government's analysis contravenes the basic rule for determining whether a statute is mandatory or directory. That rule, set forth in *Supervisors, Rock Island Co. v. United States,* 71 U. S. 435 (1867), establishes that what a public officer is empowered to do for the benefit of third parties shall be done:

> "What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his.
>
> In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose 'a positive and absolute duty'." *Id.* at 476. *Accord: Farmers & M. Bank v. Federal Reserve Bank,* 262 U. S. 649 (1923).

The Government relies on the rule that land grants should be construed favorably to the Government and that doubts concerning land grants should always be resolved in favor of the Government. This Court has held that a land grant statute is to be liberally construed to carry out

its purposes. *Great Northern R. Co. v. United States,* 315 U. S. 272 (1942); affirming *McDonald v. United States,* 119 F. 2d 821 (9th Cir. 1941). Moreover, the rule cited by the Government is balanced in this case by the rule that land grant statutes are not to be construed so as to defeat the intent of the Congress or withhold a grant that is given by necessary or fair implication. *United States v. Denver & Rio Grande R. Co.,* 150 U. S. 1, 14 (1893).

The overriding principle of statutory construction is that statutes must be interpreted to achieve the intent of the legislators who enacted them. In the case of the Carey Act, that legislative intent is clear.

III.

The legislative history of the Carey Act demonstrates that Congress intended a conditional grant of public lands to the desert land states.

The Government misunderstands the legislative history of the Carey Act. In deciding between two alternative proposals when it debated the Carey Act, Congress was analyzing two very similar pieces of legislation. The Government's brief implies that the two pieces of legislation were different in fundamental approach, with the rejected Senate Bill (S. 1591) providing for an *in praesenti* grant and the House amendment which was adopted providing for no grant at all. Neither implication is correct.

There was no debate over whether there should be an outright grant of title to the states or a discretionary grant of authority to the Secretary of the Interior. The only issues debated by Congress were (1) whether it should make a conditional grant to the states, and (2) what the

conditions of that grant should be. It was clearly understood that under either the House or Senate version, if the statute were enacted, the states were conditionally granted land, with patents to be delivered as soon as the states had reclaimed and settled the land. 26 Cong. Rec. 8388-8394 (1894).

A. A comparison of Senate Bill 1591 and the House Amendment establishes the similarity between the two statutes.

Senate Bill 1591[10] (Brief for the Petitioner at 36) did not constitute an outright grant of land to the desert land states. That bill granted the states a ten year period to select arid lands and then allowed the states to reserve the selected lands for five years to complete reclamation. However, patent to the lands was not to be issued to the states until they irrigated and reclaimed the lands and located actual settlers upon them 26 Cong. Rec. 8388 (1894). This conditional grant of land was attached by the Senate to the sundry civil appropriation bill and sent to the House. 26 Cong. Rec. 8123 (1894). This procedure of attaching a public land bill to an appropriations act created some confusion in the legislative history.

Once the bill was in the House, Representative Pickler of South Dakota attempted to obtain House approval to S. 1591 as an amendment to the sundry civil appropriation bill, but met stiff opposition from congressmen who were

10 S. 1591, 53d Cong., 2d Sess. (1894).

concerned about possible land fraud and the definition of "arid lands" in the senate bill. 26 Cong. Rec. 8389 (1894). Representative McRae of Arkansas, chairman of the House Committee on Public lands, opposed any attempted public lands legislation in the sundry civil appropriation bill, but finally proposed an amendment to S. 1591 which was adopted and became the Carey Act. After Rep. McRae offered his proposal, Rep. Pickler withdrew his motion to accede to S. 1591 and moved that the House adopt the McRae amendment. Rep. Pickler thus became the sponsor of the Carey Act in the House of Representatives.[11] The House then read into the record a report from the General Land Office of the Department of the Interior which states that the House amendment was similar in its general purposes to S. 1591. 26 Cong. Rec. 8389 (1894).

A comparison of S. 1591 with the House amendment which became the Carey Act shows the following similarities and differences:

11 26 Cong. Rec. 8389, 8419 (1894). The relationship between Rep. McRae and Rep. Pickler on the bill is instructive:

> "Mr. Pickler: Mr. Speaker, while I prefer the measure reported by the Senate, I do not desire to antagonize this proposition of the gentlemen from Arkansas, [McRae] and I withdraw my motion.
>
> Mr. McRae: The gentleman must not understand that this [Carey Act] is any proposition of mine. This proposition was prepared with some care to take the place of the one in the bill. I am not advocating either one of them, but as between the two I very much prefer this to that of the Senate. But if the gentleman from South Dakota does not want it, he need not ac-

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Comparison of Legislation considered

Item	S. 1591	House Amendment
1. Type of lands covered	"arid lands"	"desert lands"
2. States benefited	Desert land states[12] plus Nebraska, Kansas & Oklahoma	Desert land states
3. Type of grant	Grant upon conditions[13]	Grant upon conditions[14]
4. Term to select land	10 years	10 years
5. Reservation period after selection	5 years	5 years
6. Conditions to grant	Irrigate and reclaim land	Irrigate and reclaim land
7. Verification of conditions	No specific verification	Plans and proof required

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cept it. I think that we are hardly ready to legislate upon this subject, anyway.

The SPEAKER pro tempora: The gentleman from South Dakota [Mr. Pickler] withdraws his motion, and moves that the House recede from its disagreement to the Senate amendment and agree to it with this substitute therefor. The question is on that motion." 26 Cong. Rec. 8389.

12 Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, South Dakota, Utah, Washington, Wyoming. See n. 1 *supra*.

13 S. 1591:

. . . there is hereby reserved, for the purposes and upon the conditions provided in this section, . . . one million acres of the surveyed public arid lands . . . to be selected by each of said States . . . such reservation to take effect from the date of such selection and approval . . . *Provided,* That any lands so reserved

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The extensive debate in the House of Representatives on the House amendments to S. 1591 makes it quite clear that the primary concern of the House was tightening the conditions of the grant to prevent land fraud. 26 Cong. Rec. 8391-8393, 8419-8435 (1894). The Congress had made outright grants of other lands and had been highly criticized because of resulting fraud and speculation. The most noted examples were grants under the Swamp Land

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. . . not . . . reclaimed within five years from the date of their selection and approval, . . . or as to which the state has not expended . . . $3 per acre . . . for reclamation . . . shall be released from such reservation . . .

. . . as rapidly as the State may furnish competent proof that any of said lands are reclaimed and occupied by actual settlers, in accordance with its . . . regulations, patents shall issue to the state . . . *Provided,* That said States shall not sell or dispose of more than 160 acres . . .to any one person . . ." S. 1591, 26 Cong. Rec. 8388 (1894).

14 House amendment:

". . . The Secretary of the Interior . . . is authorized and empowered . . .to contract and agree, . . . binding the United States to donate, grant, and patent to the State . . . such desert lands, not exceeding 1,000,000 acres in each State, as the State may cause to be irrigated, reclaimed, and cultivated by actual settlers within ten years after the passage of this act. . . .

Before the application of any State is allowed or any contract or agreement is executed or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the said land proposed to be irrigated, which shall exhibit a plan showing the mode of the contemplated irrigation . . . and the source of the water to be used for irrigation.

As fast as any State may furnish satisfactory proof, according to such rules and regulations as may be

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Act of 1850.[15] The House amendment was therefore designed to make absolutely certain that the title to the land did not pass to the states until the provisions of the Act concerning reclamation and settlement had been met. 26 Cong. Rec. 8388-8394 (1894).

The major modifications of S. 1591 by the House amendment were the restrictions on the type of lands covered and the additional conditions[16] that had to be met before the patents were issued to the lands. On the provision that controls this case, however, both bills were identical. Both directed that the Secretary issue patents to the states "as fast as any state may furnish satisfactory proof . . . that any of the lands are irrigated, reclaimed and occupied by actual settlers." 43 U.S.C. § 641; *accord*: 26 Cong. Rec. 8388 (1894).

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prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed, and occupied by actual settlers, patents shall be issued to the State . . . *Provided,* That said States shall not sell or dispose of more than 160 acres of said land to any one person. . . ." 26 Cong. Rec. 8339 (1894).

15 The Act of September 28, 1850, 9 Stat. 519, ch. 84, 43 U.S.C. §§ 982-984 (1976).

16 The additional conditions of the house amendment were requirements that (1) the states initially provide maps and plans to the Secretary of the Interior showing the selected land and proposed manner of irrigation, and (2) the final proof of irrigation, reclamation, and settlement was to be in accordance with rules and regulations prescribed by the Secretary of the Interior. S. 1591 did not require the filing of maps and plans, and the states would have established their own rules and regulations to verify irrigation, reclamation, and settlement.

B. The Congressional Record unequivocally establishes congressional intent for a conditional grant of land.

There is little evidence to support the Government's position that the Carey Act was merely a grant of administrative discretion to the Secretary of the Interior to contract with the states. It is significant that the Government has failed to cite a single member of Congress participating in the Carey Act debates who discussed or recognized such unlimited discretion on the part of the Secretary. To the contrary, the legislative history is replete with references to the conditional grant which Congress made to the states. An examination of the Congressional debates *after* the motion to replace S. 1591 with the House amendment is enlightening.

The report of the Secretary of the Interior on S. 1591, 26 Cong. Rec. 8390 (August 10, 1894), describing the workings of the Act fails to mention "Secretarial discretion".

> "The bill is clear and is guarded in its terms. It is in the interest of small settlers. The United States holds the title until the lands reserved are actually reclaimed and settled.
>
> The principal proposition involved, reclamation and settlement by individuals in small holdings, meets my strong approval, and this bill seems to me to present full opportunity for the practical experiment and under proper safeguards. *The United States retains title until reclamation is accomplished and the land occupied by actual settlers. This, if successful, is the great object to be attained;* and if unsuccessful the United States still holds the unencumbered fee." (Emphasis added.)

The House debate on August 10, 1894, contains the following colloquy discussing the nature of the conditional grant made to the states (26 Cong. Rec. 8391-92):

> "Mr. Pickler (sponsor of the legislation in the House): Mr. Speaker, I do not care to detain the committee further than to state just what the proposition is that the Senate has placed on this bill. There are between five and six hundred million acres of Government land not yet taken, consisting largely of arid and desert lands. The question has been discussed in the House for many years past as to the best disposition to make of those lands. *Now, this is simply a proposition to donate to each of the States that the desert land laws apply to,* a million acres of such lands. Gentlemen will understand that we have between five hundred and six hundred million acres of public domain left, and *this simply proposes to appropriate thirteen or fourteen millions of these arid lands,* giving 1,000,000 acres to each of the states named.
>
> Mr. Wilson of Washington: A million acres of lands.
>
> Mr. Pickler: Yes, a million acres of desert lands.
>
> Mr. Mercer: Provided there are a million acres of arid lands within the state.
>
> Mr. Pickler: Yes, these lands are doing nobody any good now, and they never will do anybody any good until they are irrigated. This proposition does not cost the Government anything. *It simply allows each of these States to take a million acres of these desert lands and see whether or not, under the direction of the State legislatures, they can be irrigated and reclaimed.*
>
> Mr. Mercer: Do I understand that the substitute offered by the gentleman from Arkansas [Mr. McRae] has been framed by the Land Office? (The substitute offered by McRae was the House amendment which became the original Carey Act.)

> Mr. Pickler: Yes, sir. The proposition that is now before the House is one that has been approved by the Commissioner of the General Land Office and I think there can be no objection to it. Gentlemen will remember how sensitive this House has shown itself from time to time in regard to making direct appropriations for the irrigation and reclamation of arid lands. *Now, here is a proposition which costs the Government nothing, but simply donates these lands to the states, leaving them to bear the burden of irrigation and reclamation. Furthermore, it is provided that the title to these lands shall not pass to the States until it is shown to the satisfaction of the Secretary of the Interior that the lands have been reclaimed according to law and the money expended upon them."* 26 Cong. Rec. 8391 (1894). (Emphasis added.)

Later, Representative Cannon from Illinois initiated a discussion regarding the nature of the grant made to the states.

> "Mr. Cannon of Illinois: . . . Now, then, when you come to enter upon this question *and grant a million acres in each one of these States* and undertake to properly grant it upon an hour or two's discussion; and put it upon an appropriation bill so that it must pass because the appropriation bill must pass, I am very much afraid that some improvident action will be taken . . . .
>
> Mr. Pickler: Mr. Speaker, I desire to say, in reply to the gentleman from Illinois, that for probably ten or twelve years this matter of irrigation in the arid regions has been before Congress, has been discussed, has been talked about, and we have so far failed to get any legislation in regard to the matter—an utter failure in any legislation. Now, this subject is well understood by the House of Representatives. Everybody knows that this land is lying out there. They know that it is useless; and everybody desires it reclaimed. It is a very simple proposition; and the an-

swer to the objection of the gentleman from Illinois is this: *That where this differs from the swamp-land grants is that the Government does not grant this at all. The Government only grants it and the State only receives title to it after it has made its proof that the land is reclaimed. So this does not pass to the States as the swamp land passed to the States.*" 26 Cong. Rec. 8392 (1894). (Emphasis added.)

The House debate on August 11, 1894, contains frequent references to the grant made to the states.[17] Each

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17 26 Cong. Rec. 8419, 8435, August 11, 1894:

"Mr. Kilgore: Do I understand that the proposition now before the House is to *cede to the several States* these arid public lands for the purpose of enabling the States to engage in the work of irrigation?

Mr. Bryan: Yes sir.

Mr. Kilgore: Well, I am willing that all such lands shall go to the States in which they are situated.

Mr. Bryan: I was going to say, Mr. Speaker, that *this proposition is to give to the States for this purpose* land which is absolutely worthless unless water is brought upon it artifically. . . .

Now, *this bill proposes to let the States take not exceeding 1,000,000 acres each* of these lands upon condition that they provide for their irrigation. . . . certainly *no one will object to allowing these States to take these lands,* useless to us as a nation, and irrigate them, make them valuable, and then sell them to citizens who will establish homes upon them.

It provides that *the lands shall only be given to the States when they have filed their maps and plans and shown just how they are going to get water* to accomplish irrigation. 26 Cong. Rec. 8419 (1894). (Emphasis added.)

Mr. Bryan: I was advocating the amendment proposed in the House which I think is a very satisfactory one, but I shall gladly support any changes which will give additional security to the people that the *ceded lands* will be properly used. 26 Cong. Rec. 8420 (1894). (Emphasis added.)

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Mr. Bretz: Mr. Speaker, I hope this amendment will not be adopted. It occurs to me that it is a revival of the old swampland regime in another form only. This amendment provides that if any State within this arid region shall expend $3 per acre in way of irrigation, *the State shall then become* the *owner of the real estate* within the borders, or rather the million acres . . . *To cede to these States this arid land* is to place in the hands of the Legislatures of the several States an opportunity to increase the already burdensome debts of these States and territories. 26 Cong. Rec. 8421 (1894). (Emphasis added.)

Mr. Geary: The purpose of this measure *is merely to permit a State in which the lands are situated* and which presumably knows more about the wants of its people than any outside authority, *to segregate from the public lands within the State* any such portions as may be designated as convenient tracts to be irrigated from a common source, making all that area capable of maintaining population. 26 Cong. Rec. 8423 (1894). (Emphasis added.)

Mr. Coombs: The proposition contained in this amendment *is that the Government shall give to each of the States* in which such lands exist a quantity not exceeding 1,000,000 acres, on the condition that they reclaim it and sell it to settlers in quantities not exceeding 160 acres to each. 26 Cong. Rec. 8423 (1894). (Emphasis added.)

Mr. Newlands: . . . Various measures have been introduced in Congress *with reference to the granting of these arid lands* to the various States. Measures looking to this end have repeatedly passed one House and failed of consideration in the other. . . . I think I am safe in saying that it is almost the unanimous sentiment of the various irrigation committees of this Congress and of past Congresses that grants of these lands should be made to the States, and that they should undertake the work of reclamation.

. . . It is true that this very amendment provides restrictions. . . . My position is against restrictions. But this I do say, *that if the grant should be made now,* and it should be found that the restrictions are unwise, we can hereafter modify the restrictions. . . .

Mr. Pickler: This amendment provides that *the lands shall not be ceded* to the states until they have

(Continued on the next page)

of the statements noted from that day recognizes that the western states were receiving a conditional grant of land: Whether the word used is "grant", "give", "donation", "ceded", "take", or "owner", the evidence is overwhelming in favor of the states. Nowhere is the broad discretionary power now sought by the Secretary mentioned.

C. Representative McRae also understood that the western states were to receive a conditional grant.

1. Representative McRae realized that the purpose of the Carey Act was to irrigate desert lands.

The Government places great emphasis upon the role of Representative McRae. It is important to note that while Representative McRae provided the language for the House amendment, he was not the sponsor and supported it reluctantly. 26 Cong. Rec. 8389 (1894). It is a mistake to ascribe to him the sponsorship of the Carey Act.

Moreover Representative McRae's statements before the House illustrate that he understood the House Amendment to make not an outright grant, but a conditional grant to the states.

(Continued from the previous page)

complied with the regulations prescribed by the Secretary of the Interior. 26 Cong. Rec. 8427 (1894). (Emphasis added.)

Mr. Wilson of Washington: . . . There is a plateau arising above the Columbia River, upon its eastern side, to which a *donation of this character* might be of some benefit." 26 Cong. Rec. 8428 (1894). (Emphasis added.)

"Mr. McRae: The gentlemen will understand that no State is required to irrigate a million acres. The limitation proposed is 'not exceeding a million acres;' but each *State may irrigate less and secure it upon proper proof.*

Mr. McRae: . . . The amendment does not appear to be understood by some who have opposed it. It has been likened to the swamp land grant of September 28, 1850.

That was a grant *in praesenti* and passed the title as of the date of the grant. This is no grant at all, but only gives authority to the Secretary of the Interior and President to make contracts binding the United States to donate the land to the States when reclaimed. That act passed the title to the whole of the swamp and overflowed lands which were unfit for cultivation and unsold at the time to the States. This grants nothing and authorizes no conveyance *until reclamation.*

There was no limit to the swamp land grant as to the area to be taken or the time when it should be selected. Under this bill the area to each State is limited to 1,000,000 acres and the time for reclamation ten years after contract. Under the swamp land grant the States were left free to dispose of the lands before reclamation and without any limitation as to the quantity that could be sold to one person. Under this amendment *the States must reclaim the land before they get it* and must provide for its settlement and occupancy by bona fide settlers, and can not sell exceeding 160 acres to any one person." 26 Cong. Rec. 8431 (1894). (Emphasis added.)

2. Representative McRae's statement did not establish the context upon which all other congressional statements revolved.

The Government argues that much of the Congressional debate was the result of ". . . loose language (and)

was the product of a ventilation of fundamental issues of reclamation" (Brief for the Petitioner at 23). The attempt to discount the numerous statements of Congressmen referring to the Carey Act as a "grant", "gift", "donation", or "ceding" of public lands to the states by arguing that the speakers were either referring to S. 1591 or were just speaking in generalities about grants of public lands does not comport with the record of debates.

First, it makes no difference which bill the speakers referred to when discussing "grants" and "gifts" because the grant language of S. 1591 and the House amendment is nearly identical. If S. 1591 was a "grant" then the House amendment containing similar language also had to be a grant. The Congressmen understood that the only essential differences between the two pieces of legislation were the difference in description of the types of lands granted and the safeguards written into the House amendment.

Second, there is no indication in the Congressional debate that the Congressmen were speaking of "grants" in general or non-specific terms. Every speaker was clearly of the view that the Congress was granting public lands to the states, conditioned upon reclamation and irrigation.

A reading of the Congressional debates reveals that Congress was well aware of public land issues involved in the Carey Act. Congress intended a conditional grant. Subsequent legislation under the Carey Act reinforces this view.

D. Subsequent congressional action clearly establishes an intent to make a conditional grant.

The Government brief says nothing about Congressional actions subsequent to the original Carey Act. These subsequent enactments further substantiate Congress's conditional grant to the public land states. The Act of June 11, 1896, 29 Stat. 434, 43 U. S. C. § 642 (1976), specifically referenced the grants of land made in the Carey Act.

> "Under any law heretofore or hereafter enacted by any state, providing for the reclamation of arid lands, *in pursuance and acceptance of the terms of the grant made* in Section 641 of this title. . . ." 43 U. S. C. § 642 (1976). (Emphasis added.)

In 1908, Congress again amended the Carey Act to grant an additional two million acres of land to Idaho and one million acres to Wyoming. Act of May 27, 1908, ch. 200, § 1, 35 Stat. 347, 43 U. S. C. § 645 (1976); Public Resolution No. 28 (May 25, 1908), 35 Stat. 577. The debate on this legislation made it clear that in 1908 Congress understood that Carey Act lands were *granted* conditionally to the states:

> *House Debate* (42 Cong. Rec. 6436, May 16, 1908)
>
> "Mr. French: . . . The proposition is simply this: To pass this resolution *will grant to the State of Idaho* an additional 1,000,000 acres to be reclaimed under the terms of the Carey Act which was passed in 1894. The reason for offering this resolution is this: The State of Idaho has practically exhausted the million acres *granted under that act.* Some of this land has already passed to patent; some of it has been settled and patents are pending in the Department. . . .
>
> Mr. Williams: I desire to ask the gentlemen what is the difference between this bill and the bill which we voted down the other day?

> Mr. French: The difference between this bill and the bill that was voted down on Monday is this: That resolution *gave to both the States, Idaho and Wyoming,* 2,000,000 acres of land each. This limits *the grant to Idaho* alone and cuts *the grant* in two, making it a grant of 1,000,000 acres." (Emphasis added.)

If Congress when it debated the Carey Act in 1894 was discussing "grants" only in generalities, why does the legislative history continue to refer to specific "grants" to the states under the Carey Act in amendments and debates on amendments for the next 14 years?

The entire legislative history of the Carey Act and its subsequent amendments shows that although an outright grant of possession was not made, the United States did bind itself to grant the lands to the states if the states complied with the provisions of the Act and actually reclaimed the lands and placed settlers on them. The Act was a conditional grant and the federal government was obliged to issue patents once the conditions were met. Nowhere in the legislative history is there the slightest mention or discussion of any discretionary power in the Secretary of the Interior to deny applications when states had met the conditions of the Act.

E. The Carey Act does not interfere with subsequent public land legislation.

The Government's final legislative history argument is that Congress could not have intended to make a conditional grant under the Carey Act because a "floating entitlement" to desert lands would impede the Secretary of the Interior in his duty to administer the public lands for the benefit of all. The district court's decision, however, will not impede the Secretary's orderly administra-

tion of public lands. The Court did not hold that Congress established the Carey Act as a special entitlement which superseded all subsequent land use statutes, but carefully outlined the limits of the power of the states to claim Carey Act lands and the limits of the power of the Secretary of the Interior to deny proper Carey Act applications. The decision of the district court is workable and gives effect to all land use statutes.

The Secretary's continuing classification authority under Section 7 of the Taylor Grazing Act[18], and the Secretary's former classification decisions under the Classification and Multiple Use Act[19], are not overridden by the Carey Act. In fact, the Secretary's classification under these acts actually assists in determining which lands are desert lands and most appropriate for Carey Act claims. The district court properly analyzed the relationship of both classification statutes and the Carey Act by finding that the Secretary of the Interior could properly classify lands and make proper and necessary withdrawals. However, the court held that in acting under the classification statutes, the Secretary is also under a duty not to make arbitrary classifications and is under a duty to make sufficient lands available to the State of Idaho to meet the Carey Act entitlements. When considered together, the Taylor Grazing Act, the Classification and Multiple Use Act, and the Carey Act provide a reasoned and effective approach to both the management of public lands in Idaho

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18 43 U. S. C. § 315f (1976).

19 43 U. S. C. §§ 1411-1418 (1970) (became obsolete in December, 1970 by virtue of provisions in 43 U. S. C. § 1418).

and the protection of Idaho's entitlement under the Carey Act.

Subsequent to the entry of the district court judgment, Congress enacted the Federal Land Policy and Management Act of 1976, 90 Stat. 2743, 43 U. S. C. §§ 1701-1782 (1976), which restated the entire law dealing with the ownership and management of public lands. The Federal Land Policy and Management Act of 1976 did not modify or repeal the Carey Act, but provided that "[n]othing in this Act shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act." 43 U. S. C. § 1701 note (1976). Although the Act contained a great many repealers of homestead and other land-grant statutes, the Act did not repeal or modify any of the basic provisions of the Carey Act. The Act did provide mechanical means for processing Carey Act withdrawal claims.

The decision of the district court does not prevent the Secretary of the Interior from proceeding in an orderly manner to administer the public lands in Idaho. He may proceed to classify and manage lands as required by law, subject only to the duty to make available to the state desert lands suitable for reclamation purposes when the state requests them.

IV.

There is no long standing departmental policy establishing unfettered discretion in the Secretary to deny Carey Act applications.

It is well established that the rule regarding deference to consistent administrative interpretation applies

only to statutes reasonably susceptible of different constructions and that the federal courts are not obligated to follow any administrative decisions that are inconsistent with a statutory mandate or that frustrate Congressional intent. *Volkswagenwerk v. FMC,* 390 U. S. 261, 272 (1968). In this case, however, the only consistent administrative action taken by the Interior Department with respect to the Carey Act deals with the procedure for filing claims. This is, of course, consistent with the statute itself which gave the Secretary discretion over the means by which Carey Act patents were to be obtained, but not over whether the state had the right to pursue its entitlement and attempt the irrigation and settlement leading to patent.

Concerning the issue of secretarial discretion, deference to consistent administrative interpretation is inapplicable. There has been no consistent administrative interpretation. The original Carey Act Regulations specify in detail the information and material which the states must furnish to comply with the requirements of the Act. 37 Pub. Lands Dec. 624 (1909). No mention was made of any Secretarial authority to decide that a desert land state could not pursue patent of the acres granted it. Indeed, the whole thrust of the regulations was to limit the Secretary's authority.[20]

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20 These regulations contain detailed provisions for filing Carey Act applications. For example, lists received containing erasures will not be filed (Rule 5); carbon copies of the contract will not be accepted (Rule 6). In spite of this minutia of detail, no mention of Secretarial discretion is made. In fact the regulations by their detail, establish rigid limits to the Secretary's authority. One regulation, Form 5, which is the contract *required* to be executed by

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As late as 1901, the Secretary of the Interior, in commenting on a proposed amendment to the Carey Act, specifically recognized that the Act constituted a grant to the desert land states: "If this amendment is adopted, the result will be that each state affected can from time to time obtain segregations of arid lands *under this grant until the full amount of 1,000,000 acres is obtained . . . .*" 34 Cong. Rec. 3295 (1901) (Emphasis added). This 1901 letter from the Secretary of the Interior, together with

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the State and the Secretary clearly delimits the authority of the Secretary.

> ". . . behalf of the United States of America, party of the first part, and — for and on behalf of the State of —, party of the second part, witnesseth:
>
> That in consideration of the stipulations and agreements hereinafter made, and of the fact that said State has, under the provisions of section 4 of the act of Congress approved August 18, 1894, of the act of Congress approved June 11, 1896, and of the act of Congress approved March 3, 1901, a through —, its proper officer, thereunto *duly authorized, presented its proper application for certain lands situated within said State and alleged to be desert in character and particularly described as follows, to wit:* List No. — (here insert list of lands and total area), and has filed a map of said lands and exhibited a plan showing the mode by which it is proposed that said lands shall be irrigated and reclaimed and the source of the water to be used for that purpose, the said party of the first part contracts and approval of —, b President thereof, *hereby binds the United States of America to donate, grant, and patent to said State, or to its* assigns, free from cost for survey or price, c any particular tract or tracts of said lands, whenever an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim the same, in accordance with the provisions of said act of Congress, and with the regulations issued thereunder, and with the terms of this contract, at any time within ten years from the date of the approval of the said map of the lands." 37 Pub. Lands Dec. 624 (1909).

the original regulations, leave no doubt about the original understanding of the Interior Department concerning secretarial discretion.

There is only a single decision, *State of Wyoming,* 36 Pub. Lands Dec. 395 (1908), which provides any support for the government. Even that case does not stand for the position urged by the Government. It stands for the limited position that public lands properly withdrawn prior to the filing of the state's application under the Carey Act are not available to the state and the Secretary therefore has authority and discretion to deny such an application. On this narrow issue, this single 1908 administrative decision incorrectly interprets the provisions of the Carey Act and should be disregarded. In any event, the precedent of the decision is limited to those situations in which a proper withdrawal has been made prior to the Carey Act application.

The broad dicta of *State of Wyoming, supra,* stands alone. This case has never been followed. A review of the entire body of administrative decisions by the Department of the Interior establishes that the 1908 *State of Wyoming* decision is the only decision holding that the Secretary has any discretion to deny any application by a state for Carey Act land.[21]

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21 *Yakima Development Co. v. Washington,* 34 Pub. Lands Dec. 453 (1906), holds only that when a state's proposal does not meet the requirements of the Carey Act it may be denied. There is no indication that the proposal in *Yakima* complied with the Carey Act and was denied by the Secretary by reason of discretion. In fact, this case illustrates the only type of discretion the Secretary is granted under the Act: administrative discretion to determine whenever the statutory requirements of the Act have been met. If the requirements are met, then the Secretary must issue the patent. *Supervisors, Rock Island Co. v. United States,* 71 U. S. 435, 476 (1867).

While courts must accord great weight to the interpretations given a statute by an agency, the overriding role of this Court is to effectuate Congressional intent. *Volkswagenwerk v. FMC,* 390 U. S. 261, 272 (1968). In other words, the Congressional policy underlying a statute must be given effect. The extensive legislative history of the Carey Act shows that the Government's construction must be rejected. There is no consistent interpretation of the Carey Act that permits the Secretary unfettered discretion. This, in light of the long standing practices of the western states, clearly establishes the error of the Government's position.

V.

Contemporaneous judicial statements and treatises recognize the establishment of an entitlement to desert lands.

A. Contemporaneous statements of jurists exhibit an understanding of the Carey Act as a conditional grant to the desert land states.

Although judicial precedent is limited, all available cases which discuss the Carey Act recognize the Congressional intent to make a conditional grant of lands to the desert land states. Further, each decision, federal or state, recognizes that the states had an enforceable entitlement to the lands once the conditions had been performed. Much of this judicial precedent is contemporaneous with the Carey Act and the period of land development that followed its enactment. These cases bear close examination not only because of what they hold, but also because

they illustrate the understanding of jurists shortly following the enactment of the Carey Act.

The clearest statement of contemporary judicial understanding of the nature of the grant made by the Carey Act is found in the words of this Court in a 1923 decision:

> "By the Carey Act the United States binds itself to donate, grant, and patent to a state, complying with stated conditions, desert lands, which the state may cause to be irrigated, reclaimed, and occupied. The state is required to file a map of the land proposed to be irrigated showing the plan of irrigation, etc., and is authorized to make contracts, to cause the land to be reclaimed, and to induce their settlement and cultivation. *Upon satisfactory proof* the Secretary of the Interior *is directed to issue patents* to the State or its assigns." *Idaho Irr. Co. v. Gooding,* 265 U. S. 518, 521 (1923). (Emphasis added.)

The statements of the Supreme Court of Montana in two early cases demonstrate the public understanding existing in the 1890's that the federal government had indeed granted and ceded large quantities of desert lands to the states conditioned only on the reclamation of the lands by actual settlers. In *State v. Wright,* 17 Mont. 565, 44 P. 89 (Mont. 1896), the Court stated:

> ". . . We are satisfied that the law [Carey Act] is valid. The United States had the power to make the offer to the state, to grant it the lands provided the state would reclaim them. Of this there can be no doubt . . . . We believe the acceptance was valid. The legislature having accepted the offer, its next right, in the premises, was to provide a detailed method whereby the state could execute the acceptance and make it operative. This they have done. The attitude of the state thereby became that of an agent of the United States, to make effective the offer of the

latter to part with its desert lands to the state or its assigns, provided the state can reclaim such lands, and induce the actual settlement and cultivation thereof. This the state has undertaken to make possible by legislation. *If the state fails, the United States will not issue its patents. If the state succeeds, the United States has agreed to pass the title to the state, or its assigns, upon satisfactory proof of the fulfillment of the requirements of the acts of Congress.*" *Id.* at 572-573, P. at 92. (Emphasis added.)

Two years later, in *State v. Marshall,* 20 Mont. 510, 52 P. 268 (Mont. 1898) the same court stated:

> ". . . The *general government has by law made to the state conditionally a magnificent donation of lands.* It is of the highest importance that the legislature of the state should make provision by law for performing the conditions upon which the right of the people to acquire the lands thus donated depends. Our legislature, appreciating this important duty to the people, has been prompt in taking the necessary steps and providing the essential means for acquiring title to the arid lands granted, as said above, to the state." *Id.* at 514-515, P. at 270. (Emphasis added.)

The Montana jurists, who were contemporaries of the Congressmen who enacted the Carey Act in 1894, clearly understood that the Act was much more than a mere authorization to the Secretary of the Interior to permit the patent of desert lands if in his sole discretion he decided that such would be in the best interest of the public. These jurists understood and stated that the Carey Act was a *conditional* grant or donation of public lands to the states, and that once the states complied with the stated conditions the federal government was obligated to issue patent. This same understanding is demonstrated by the federal courts.

In *M'Kinney v. Big Horn Basin Development Co.,* 167 F. 770 (8th Cir. 1909), the Court of Appeals pointed out that Carey Act grants were not *in praesenti* as to possession because the state first had to comply with the conditions of the Act before patents would issue:

> "The underlying purpose of the acts of Congress in ceding the vast domain of desert lands within the territorial limits of the given state was, through the agency of the state government more immediately concerned, to speedily have them reclaimed from an unproductive waste by means of artificial irrigation, whereby they might become susceptible of human sustentation, bring population and wealth to the state. *But Congress did not make the grant to the state of such lands in mass to take effect in praesenti. The state was first to furnish satisfactory evidence to the Secretary of the Interior that the lands are irrigated, reclaimed, and occupied by actual settlers before any patent therefore should issue.*" *Id.* at 775. (Emphasis added.)

In *Twin Falls Salmon River Land & Water Co. v. Caldwell,* 242 F. 177 (9th Cir. 1917), *aff'd on rehearing,* 272 F. 356 (9th Cir. 1921) the Court of Appeals discussed the Carey Act as a "grant to the public land states";[22] and in *Idaho Irrigation Co. v. Gooding,* 285 F. 453 (9th Cir.

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22 "It is also apparent from the language of the act of August 18, 1894, that the grant to the public land states containing the specified desert lands was not a grant *in praesenti,* but, on the contrary, such states were made the agency through which the lands might be reclaimed, and the terms and conditions were therein prescribed by Congress, on the performance of which the title of the United States should pass by patent of the government." 242 F. at 184. (Emphasis added.)

"The act of Congress . . . further provided that as *fast as any such state should furnish satisfactory proof*

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1922), *aff'd in part and rev'd in part,* 265 U. S. 518 (1923), the same court emphasized that the purpose of Congress in the Carey Act was to reclaim the desert lands of the west by actual settlers on small tracts.[23]

Finally, the United States District Court in Idaho also stated its opinion that the Carey Act constituted a grant of lands to the states to be accepted by complying with the conditions of the Act. In *Twin Falls Land & Water Co. v. Twin Falls Canal Co.,* 7 F. Supp. 238 (D. Idaho, 1933), *aff'd,* 79 F. 2d 431 (9th Cir. 1935), the district court stated:

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according to the rules and regulations prescribed by the Secretary of the Interior of the reclamation, irrigation, and cultivation by actual settlers of any of such lands, *patent should be issued the state or its assigns thereof,* . . ." 242 F. at 183.

". . . It is further provided that, *as fast as any state may furnish satisfactory proof* according to such rules and regulations as may be prescribed by the Secretary of the Interior that any of said lands are irrigated, reclaimed, and occupied by actual settlers, *patent shall be issued to the state or its assigns* for the said lands so reclaimed and settled." 272 F. at 359.

23 ". . . The act of Congress referred to expressly declared that its purpose was to aid the public land states in the reclamation of desert lands therein, and in the settlement, cultivation, and sale thereof in small amounts to actual settlers. To carry this purpose into effect, it was provided, among other things, that before the application of the state was allowed, or any contract was executed or any segregation of any of the desert lands from the public domain was ordered by the Secretary of the Interior, such state should file a map of the land proposed to be irrigated, together with a plan showing the mode of the contemplated irrigation, which plan should be sufficient to thoroughly irrigate and reclaim said desert lands, and prepare the same to raise ordinary agricultural crops, and also show the source of water to be used for its irrigation and reclamation." 285 F. at 457.

"In 1894 by the passage of the Carey Act a new policy to effectuate the reclamation of the desert lands of the arid West was initiated by the Congress. Title 43 USCA, Sec. 641, et seq. By its terms, as an aid to the cultivation of tracts upon such arid regions, the United States *offered to grant to states complying with the requirements* of the enactment, large bodies of desert land. *This statutory offer was formally accepted by the State of Idaho,* which laid down an elaborate and carefully guarded method of procedure for persons desiring to construct such projects and for settlers thereon". *Id.* at 240. (Emphasis added.)

"The State of Idaho in its sovereign capacity was interested in the development of prosperous communities upon desert lands within its boundaries. It has adopted a code, intricate in detail and various in ramification to protect that resource. Pursuant to this policy and with the beneficent purpose of utilizing this resource upon the 'Great American Desert' the legislation, state and national, heretofore adverted to, was enacted." *Id.* at 245.

Judicial precedent clearly takes a position directly contrary to that taken by the Government. None of the opinions supports the proposition that the Secretary has discretion to arbitrarily deny Carey Act applications. Rather, each recognizes that the intent of the Act is to make a conditional grant of an important resource to the desert land states. The states were charged with the duty of accepting the grant and implementing the procedures necessary to comply with the requirements of the Act. The grant is clear and absolute and the transfer of title to the states is limited only by the condition that the states comply with certain requirements of the Act prior to issuance of patent. Once a state has identified desert lands and requested their temporary withdrawal or segregation, the defendant Secretary may not arbitrarily

deny the request, but must allow the state to proceed to meet the other requirements of the Act and obtain patent.

B. The Carey Act's grant to the desert land states is uniformly acknowledged among historical commentators.

The Government's brief cites several historical treatises which it considers authoritative on the issues of this case (Brief for the Petitioner at 12-15). It is significant that every one of the authoritative treatises cited by the Government in its brief clearly states that the purpose of the Carey Act was to make a conditional grant or guarantee of public lands to the desert land states.

Hibbard, in B. Hibbard, *A History of the Public Land Policies* 436 (1924) (1965 reprint) calls the Carey Act an agreement "to donate to certain states a quantity of land, . . ., which they should cause to be settled, irrigated and, in part, cultivated;". In a similar description, P. Gates, *History of Public Land Law Development* 648 (1968), characterizes the Carey Act as "a measure to provide for a grant of up to a million acres to each of the states containing desert lands to aid in their reclamation." Finally, E. Louise Peffer, *The Closing of the Public Domain* 20 (1951) (1972 reprint) states that the Carey Act "guaranteed to each of certain states up to one million acres of such dry public land within its borders as it was able to have irrigated, settled, and occupied."

The offer/acceptance nature of the grant made by the Carey Act has also been noted in Kinney's authoritative treatise on Irrigation and Water Rights:

> "Acceptance of the grant made by the Carey Act by the States named.—The first step to be taken by a State which wishes to avail itself of the benefits of the grant made by the Carey Act of the one million acres of land is to accept the terms of the grant and to provide for the machinery for the reclamation of the land. The power of the State is limited to the acceptance of the offer of the United States, and the execution of the trust assumed by the acceptance thereof." III *Kinney on Irrigation and Water Rights.* Sec. 1325 (2d ed. 1912).

The State of Idaho accepted the offer of the federal government in 1895,[24] and a binding contract was created.

CONCLUSION

In this, as in any statutory interpretation case, the judicial task is to ascertain legislative intent. Any objective inquiry into the intent of the Congress that passed the Carey Act leads inevitably to the conclusion that Congress intended to grant desert lands under the Act subject only to two reclamation conditions: as fast as settlement and irrigation occurred, patents were to issue.

The task of ascertaining Congressional intent has been faithfully and correctly performed by the lower courts. They are the courts which serve most of the lands affected by the Carey Act. Their unanimous judgment should be upheld.

Respectfully submitted,

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24 *Idaho Code,* § 42-2001 (1977).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 11th day of January, 1980, three copies of BRIEF FOR THE STATE OF IDAHO, were mailed, postage prepaid, to:

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Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1979

No. 79-260

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,

Petitioner,

vs.

STATE OF IDAHO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF IDAHO CAREY ACT DEVELOPMENT ASSOCIATION IN SUPPORT OF RESPONDENT

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In The

Supreme Court of the United States

October Term, 1979

No. 79-260

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,

Petitioner,

vs.

STATE OF IDAHO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF IDAHO CAREY ACT DEVELOPMENT ASSOCIATION IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE AND CONSENT TO FILE

The Idaho Carey Act Development Association is an unincorporated Idaho association composed of seventy-six different member projects whose purpose is to assist their individual settlers in the acquisition, irrigation, reclamation, and development of desert lands in Idaho,

The Association and its member projects represent more than 2,530 individual applicants for Carey Act desert lands in Idaho. These individual applicants have made application to the Idaho Department of Water Resources to segregate and withdraw desert lands under the Carey Act, 28 Stat. 422, 43 U. S. C. 641, and to irrigate, reclaim and develop these lands. To date the 2,530 individual applicants have filed applications for segregation and withdrawal of more than 405,950 acres of desert lands within the State of Idaho. In most instances, the Idaho Department of Water Resources has accepted these applications and has petitioned the Department of the Interior for temporary withdrawal of the selected lands.

In processing the Carey Act applications submitted by the State of Idaho, the Department of the Interior has taken the position that: (1) The Department has uncontrolled discretion to approve or disapprove the applications for Carey Act lands; (2) A married woman living with her husband may not make a separate application for Carey Act lands; and (3) A home built on the dividing line between entries will not qualify as a residence for both entries. Each of these positions was challenged in the suit below in the District Court and judgment was entered against the government on each issue. That judgment was affirmed by the United States Court of Appeals for the Ninth Circuit. The government has chosen not to appeal the decision against it on the second and third issues.

Since the entry of the District Court judgment, the Department of the Interior has held all Carey Act applications in abeyance, pending a determination of the respective rights of the parties by this Court. As a result, no Carey Act entries have been allowed in Idaho since 1976.

The Idaho Carey Act Development Association is the proper spokesman for most of the individual settlers who have claims for Idaho desert lands under the Carey Act pending before the Department of the Interior. These individual settlers, who desire to develop irrigation projects under the Carey Act, are the real parties in interest in this lawsuit. It is their entitlement to desert lands that will be determined by the Court in this proceeding.

The Solicitor General and Attorney General for the State of Idaho have given written consent to the Idaho Carey Act Development Association to file a brief as amicus curiae. Copies of these written consents have been filed with the Clerk.

———o———

QUESTION PRESENTED

Whether by enacting the Carey Act, 43 U. S. C. § 641, Congress made its own judgment that upon complying with the statutory reclamation conditions, the desert land states were entitled to receive public lands for use by individual citizens, or whether Congress intended to leave the issue of entitlement to public lands to the unlimited discretion of succeeding secretaries of the Interior.

———o———

ARGUMENT

I. The Carey Act grants the desert land states an enforceable entitlement to public lands.

This case involves the interpretation of the Carey Act, 28 Stat. 422, 43 U. S. C. 641 *et seq.* The government maintains that the Carey Act establishes no entitlement to any public lands, and is merely a grant of discretionary authority to the Secretary of the Interior. The courts below held against the government and found that the Carey Act created enforceable rights in the desert land states.

The overriding principle of statutory interpretation is that courts should interpret the "words of these statutes in light of the purposes Congress sought to serve." *Chapman v. Houston Walfare Rights Organization,* 99 S. Ct. 1905, 1911 (1979). This case should, therefore, focus on determining the Congressional intent and purpose in enacting the Carey Act, and the Court should construe the Act in a manner to give effect to that intent.

The Carey Act was one of several federal programs enacted in the late 1800's to encourage the settlement and reclamation of the vast federal lands in the western United States. Unlike other land grant legislation like the Desert Land Entry Act, 43 U. S. C. 321-339, Homestead Act, 43 U. S. C. 161-302 and Timber and Stone Purchase Act, 43 U. S. C. 311-313 (repealed 1955) in which the federal government dealt directly with each individual settler, the Carey Act was an effort to involve the individual states in reclamation programs and have them initiate and supervise the settlement of desert lands. It represented a compromise between the faction of Congress that wanted the federal government to control reclamation

and take primary responsibility for the development and settlement of the public domain, and those advocating "states rights" or the opportunity for the states to decide and regulate settlement and growth on public lands within their borders. The proponents of the Carey Act felt that, given a chance, the states working in conjunction with private interests could best accomplish the reclaiming of arid western lands. 26 Cong. Rec. 8429-8431 (1894).

Because of favorable physical conditions, Idaho led the way in the reclamation of desert lands under the Carey Act. By 1912, over 30 separate projects had been accepted, including over 1,000,000 acres, and the amount reclaimed and patented was over 210,000 acres. *Hearing before the Comm. on Irrigation and Reclamation of Arid Lands,* 62 Cong., U. S. Senate, Carey Act, 1912, p. 12-13. However, by 1915 most of the Idaho desert lands irrigable by existing gravity flow methods had been reclaimed and very few claims were filed under the Carey Act for the next 50 years. In the 1960's, the development of effective sprinkler irrigation systems using deep wells as a source of water supply opened the possibility of reclaiming and irrigating thousands of acres of hitherto unusable desert lands. Interest in the Carey Act was suddenly rekindled and hundreds of claims were filed with the State of Idaho.

Because of the 50 year hiatus in the use of the Carey Act entitlements, almost all of the history of the Carey Act is found in Congressional debate, subsequent amendatory acts, judicial comments, and statements by contemporary treatise writers during the period from 1894 to 1920. This information, however, uniformly establishes that all those who dealt with the enactment, amendment and ad-

ministration of the Carey Act understood that it made important grants of enforceable entitlements to the desert land states. This history establishes that the Carey Act was a contractual grant between the federal government and the states to the effect that if the states would provide the organization and funding to select, reclaim, irrigate and settle desert lands, the federal government would then obligate itself to issue patents to the states or their assigns. The remainder of this argument summarizes the language, history, and policy of the Carey Act which leads to the conclusion that the District and Circuit Courts correctly construed the Carey Act.

II. The language of the Carey Act shows an entitlement to public lands.

The Carey Act authorizes the Secretary of the Interior to contract with the states to donate, grant, and patent desert lands. It provides:

> As fast as any state may furnish satisfactory proof . . . that any of said lands are irrigated, reclaimed, and occupied by actual settlers, patents shall be issued to the State or its assigns. 43 U. S. C. 641.

It would be difficult to state any more clearly the congressional judgment that patents were to issue as fast as any state furnished proof that the desert lands had been irrigated, reclaimed, and settled. Nevertheless, the Government attempts to find support for its position from three statutory phrases: (1) the Act "authorizes" the Secretary to enter into contracts, (2) the Act grants "not exceeding" three million acres in Idaho's case, and (3) the President must "approve" all contracts. None of these phrases is inconsistent with the congressional purpose that

is so clearly expressed in the other parts of the statute and its history and administration. "Authorization" would be necessary in either event, whether Congress intended to leave a discretion in the Secretary, or to require him to issue patents as fast as the irrigation and reclamation conditions were met. "Not exceeding" three million acres is merely a limit that recognizes that the states might or might not be able to satisfy the conditions for the full statutory authorization. Indeed, as of this date none of the desert land states has exceeded the limit. Finally, the requirement of presidential "approval" argues neither for nor against secretarial discretion. Approval would be appropriate in either case, in order to assure that the State had in fact met the conditions prescribed by Congress. In short, the three features of the statute relied upon by the Government are consistent with either secretarial discretion, or secretarial obligation to patent as fast as irrigation and settlement are proven. To determine which of these policies Congress in fact selected, other parts of the statute and its history must be consulted. That inquiry demonstrates a clear understanding by those who dealt with and administered the Carey Act that it obligated the Secretary to grant patents once reclamation had been completed.

III. Congress intended to grant enforceable entitlements in the desert land states.

The Congressional debate on the Carey Act makes it abundantly clear that Congress was granting an enforceable right to 1,000,000 acres of desert lands to the specified states and their citizens, subject to their duty to select, irrigate, and reclaim the lands. The overriding purpose

of the Congress was to get the desert lands into the hands of individual settlers in parcels of 160 acres each, but to do so in a way that would avoid the fraud and land speculation that had accompanied outright grants to the states. Accordingly, the Congress withheld the title to the lands until the states completed reclamation and settlement, but agreed to issue patents promptly when the conditions were met. 26 Cong. Rec. 8423 (1894). The Congressional debate is replete with references to the "grant," "ceding," "gifting," and "donating" of public lands to the desert land states. 26 Cong. Rec. 8388-8392, 8419-8434 (1894). The Congressmen well understood that they were making an enforceable grant, but protecting it with conditions:

> Now, here is a proposition which costs the government nothing, but simply donates these lands to the State, leaving them to bear the burden of irrigation and reclamation. Furthermore, it is provided that the title to these lands shall not pass to the States until it is shown to the satisfaction of the Secretary of the Interior that the lands have been reclaimed according to law and the money expended upon them. 26 Cong. Rec. 8391. (August 10, 1894)

The desert land states understood that the Carey Act granted them enforceable contract rights and that they had to accept the offer made by the federal government to receive those benefits. Each of the desert land states promptly enacted legislation accepting the "grants of land" made to them by the federal government in the Carey Act. See *Idaho Code* § 42-2001.

Furthermore, subsequent Congresses also recognized the rights and entitlements of the desert land states. Amendatory bills to the Carey Act and the congressional

debate on those bills referred again and again to the Carey Act as a "grant of 1,000,000 acres" to the states. The Act of June 11, 1896, 29 Stat. 434, 43 U. S. C. § 642; 42 Cong. Rec. 6436 (1908).

IV. Contemporary jurists and authors recognized the grant of rights.

Contemporary jurists, familiar with the history and purposes of the Carey Act, uniformly recognized that it constituted a conditional grant of public lands to the desert land states. The following statements are indicative of the judicial understanding of the purpose of the Carey Act:

> By the Carey Act the United States binds itself to donate, grant, and patent to a state, complying with stated conditions, desert lands, which the state may cause to be irrigated, reclaimed, and occupied. . . . Upon satisfactory proof, the Secretary of the Interior is directed to issue patents to the state or its assigns. *Idaho Irrigation Co. v. Gooding,* 265 U. S. 518, 521 (1923).

The underlying purpose of the acts of Congress in ceding the vast domain of desert lands within the territorial limits of the given state was, through the agency of the state government more immediately concerned, to speedily have them reclaimed. . . . But Congress did not make the grant to the state of such lands in mass to take effect in praesenti. The state was first to furnish satisfactory evidence to the Secretary of the Interior that the lands are irrigated, reclaimed, and occupied by actual settlers before any patent therefor should issue. *M'Kinny v. Big Horn Basin Development Co.,* 167 Fed. 770, 775 (8th Cir. 1909).

The United States had the power to make the offer to the state, to grant it the lands provided the

> state would reclaim them. Of this there can be no doubt. . . . We believe the acceptance was valid. The legislature having accepted the offer, its next right . . . was to provide a detailed method whereby the state could execute the acceptance and make it operative. This they have done. *State v. Wright,* 44 P. 89, 92 (Mont. 1896).

Authors and researchers have also concluded that the Carey Act constituted a "guarantee to each of certain states up to one million acres of such dry public land. . . ." (Peffer, *Use and Abuse of America's Natural Resources,* 1972, p. 20), or an agreement "to donate to certain states a quantity of land, not over 1,000,000 acres each, which they should cause to be settled, irrigated, and in part, cultivated." (Hibbard, *A History of the Public Land Policies,* 1924, p. 436), or "a measure to provide for a grant of up to a million acres to each of the states containing desert lands. . . ." (Gates, *History of Public Land Law Development,* 1968, p. 648). The exhaustive contemporary treatise of *Kinney on Irrigation and Water Rights,* 2d ed. (1912), Vol. III, at Sec. 1325, concludes that the Carey Act was a grant to the named states and that the states were required to enact legislation to accept the contractual offer made by the federal government.

V. Departmental precedent does not favor the government.

The answer to the government's argument that the Court should defer to administrative construction of the Cary Act is quite simply that there is no uniform administrative construction of the Act which favors the government. In fact, the earliest departmental statements on the Act explicitly recognize the existence of a grant to the

desert land states, a position directly contrary to that now taken by the Government. On February 9, 1901, Secretary of the Interior Hitchcock reported to the Senate committee on Public Lands concerning a proposed amendment to the Carey Act and stated in part as follows:

> The result is that the States will not receive *the full quota of the lands intended to be granted,* nor will the purposes of the Act be anything like accomplished, unless the limitation with respect to time be so changed that the period of ten years shall commence to run in each instance from the date of the segregation instead of from the date of *the original granting act.* . . .
>
> If this amendment is adopted, the result will be that *each State affected can from time to time obtain segregations of arid lands under this grant until the full amount of 1,000,000 acres is obtained.* . . . 34 Cong. Rec. 3295 (1901); See also *Senate Report No. 262,* 66th Congress, 1st Session (1901). (Emphasis added.)

There is no indication in the language of the Carey Act, in its legislative history, or contemporary comment that if a state complies with all of the conditions of the statute, the Secretary of the Interior still retains the authority to decide whether or not to transfer lands to the states. Such power and authority would create in the Secretary the discretion to effectively repeal the congressional judgment that once the conditions were met, the lands were to be granted. Clearly, if Congress had intended that the Secretary have such power to reverse its own policy decision, it would have said so. Moreover, such an interpretation would convert the Carey Act into a statement of policy or advice, something that would come about if the Secretary thinks it is a good idea. It

would leave the Carey Act policy subject to changes in administrations and changes in the Secretary of the Interior. There is no language to this effect in the Act because that simply was not the policy judgment made by Congress.

———o———

CONCLUSION

The language of the Act, its legislative history, and contemporary judicial treatise commentary show that the Carey Act was a Congressional grant entitling each state to select and reclaim 1,000,000 acres of desert lands. Congress put no time limitations on this grant and the states are still free to complete their contractual obligations under this Act and obtain title to the remaining lands for the benefit of individual citizens. The Secretary of the Interior does not have discretion to set aside the Congressional mandate expressed in the Carey Act. The well reasoned opinion of the District Court should be affirmed.

Respectfully submitted,

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FILED
JAN 11 1980
MICHAEL RODAK, JR., CLERK

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October Term 1979

No. 79-260

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BRIEF OF AMICI CURIAE, STATES OF ARIZONA, CALIFORNIA, COLORADO, MONTANA, NEVADA, OREGON, UTAH, WASHINGTON AND WYOMING IN SUPPORT OF STATE OF IDAHO

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—o—

I.
INTEREST OF AMICI

The western states named herein as *amici curiae* contain lands which have been transformed into economically productive and socially inhabitable regions because of federal policy promoting reclamation of desert lands. Pursuant to this policy, Congress enacted the Carey Act in 1894. By this time most of the land with an available source of water had been reclaimed and was under cultivation. The lands settled by the earliest settlers were closest to the natural waterways, and it soon became evident that lands lying further in proximity from streams could be cultivated only by construction of irrigation and diversion works. Neither the Homestead Act nor the Desert Land Act offered the necessary format for such reclamation projects. The Carey Act offered the solution.

Under its provisions, states were granted a right of entitlement under which the federal government would convey to the state desert lands free from cost whenever an ample supply of water was furnished to reclaim the lands within the statutory period. Once such lands were reclaimed, settled, and put under cultivation, as required by the Act, the United States was bound to transfer title to the state. The state, in turn, had the power to make any contract necessary to secure the reclamation of the lands. When the conditions of this contract were executed, the project was generally turned over to the operating company which would in turn contract with settlers for the sale of water rights and pertinent lands. The contract would also include the terms for turning the project over to the settlers, and the establishment of the settlers' operating company.

Almost immediately after the passage of the Carey Act, many state legislatures in the western United States, including those named herein as *amici curiae,* enacted laws accepting the conditions of the federal grant. M. Williams, *The History of Development and Current Status of the Carey Act in Idaho,* 5 (1970).

Improving technology for bringing lands under irrigation has revived interest in Carey Act developments. The Act is still a valid federal land law and is as ready for operation today as it was in 1894 with a full body of active federal laws and regulations. The Act and its legislative history, as well as pertinent case law, demonstrate that the Act granted to each state a right of entitlement to desert lands upon compliance with the provisions of the Act. The Secretary's duty is to assure compliance with

the Act. Once the state has complied, the Secretary is mandated to transfer title to the state.

The lower court's decision is in accord with the terms of the Act and its legislative intent. The *amici* thus wish to advise the Court of their position in support of the lower court's decision.

II.

QUESTIONS PRESENTED

1. Whether the Carey Act, as amended, conferred upon the State of Idaho a right of entitlement to three million acres of desert land suitable for irrigation, cultivation and settlement.

2. Whether the Secretary of Interior must issue to the State of Idaho patents to suitable desert lands to the extent of Idaho's remaining Carey Act entitlement upon Idaho's compliance with the terms of the Act.

III.

ARGUMENT

A. The language of the Carey Act grants federal lands to the states upon compliance with the conditions set forth in the Act.

The United States argues that the Secretary was given absolute discretion over grants under the Carey Act, and that therefore the state has no enforceable entitlement

with respect to irrigable desert lands. The Carey Act, however, is not a legislative authorization to the Secretary allowing him to make desert lands available for settlement and patent at some future date if he so desires. It is instead an absolute grant of federal lands to the public land states upon condition that the states proceed to identify and reclaim desert lands in accordance with the provisions of the Act. If they do so, the Secretary is directed to issue patents to the states.

The Carey Act reads in pertinent part as follows:

> To aid the public land states in the reclamation of the desert lands therein, and the settlement, cultivation and the sale thereof in small tracts to actual settlers, the Secretary of the Interior is, as of August 18, 1894, authorized and empowered, upon proper application of the state to contract and agree, from time to time, with each of the states in which there may be situated desert lands . . . *binding the United States to donate, grant and patent to the state* free of cost for survey or price such desert lands, not exceeding one million acres in each state. . . .
>
> * * *
>
> *As fast as any state may furnish satisfactory proof* according to such rules and regulations as may be prescribed by the Secretary of Interior, that any of said lands are irrigated, reclaimed and occupied by actual settlers, *patents shall be issued to the states or its assigns*. . . . 43 U. S. C. § 641 (1970). (Emphasis added.)

The Act thus created a contract between the federal government and the state. The federal government contracted to donate and grant desert lands, which offer had to be accepted by the states to become effective. Once accepted, the offer created a contractual obligation binding upon

both the state and the federal government. III *Kinney on Irrigation and Water Rights,* § 1325 (2d ed. 1912), provides as follows:

> The first step to be taken by a state which wishes to avail itself of the benefits of the grant made by the Carey Act of the one million acres of land is to accept the terms of the grant and to provide for the machinery for the reclamation of the land. The power of the state is limited to the acceptance of the offer of the United States, and the execution of the trust assumed by the acceptance thereof.

When the State of Idaho enacted enabling legislation accepting the offer of the federal government, a binding contract was created. Under this contract, "the federal government and the state covenanted that the federal government would convey to the state the land free from costs whenever an ample supply of water was furnished to reclaim the lands, provided the lands were reclaimed in the statutory period." M. Williams, *The History of Development and Current Status of the Carey Act in Idaho,* 5 (1970).

The government argues that the language of the statute is permissive because the Secretary is "authorized and empowered" to grant desert land to the state. However, an examination of the entire Act, including its nature and purposes, clearly shows that the duty to transfer title to the state was mandatory, once the state had complied with the conditions of the Act to reclaim desert lands.

It has been held on frequent occasions that the words used in a statute are not determinative of whether it involves a mandatory or discretionary duty. In *United States v. Reeb,* 433 F. 2d 381 (9th Cir. 1970), the court

stated that the word "shall" may be employed as an imperative or as a directory only, just as "may" may be mandatory. The court explained that "the interpretation of these words depends upon the background circumstances and context in which they are used and the intention of the legislative body or administrative agency which used them." 433 F. 2d at 383.

In *Wilshire Oil Company v. Costello,* 348 F. 2d 241 (9th Cir. 1965), the court concluded that "no rule of thumb exists as to what is merely 'directory' in a statute, and what is 'mandatory.' The word 'shall' in a statute may sometimes be directory only, or the word 'may,' seemingly much less forceful, may be mandatory. . . . A statute should not be construed as to be rendered meaningless." 348 F. 2d at 243.

The reading of the statute which the government urges would frustrate the clear congressional purpose behind the Carey Act. The Carey Act represented compromise legislation giving special rights of entitlement to desert land states in an effort to resolve long-standing disputes over the method of developing arid western lands. *See III Kinney on Irrigation and Water Rights,* 2388 et seq. (2d ed. 1912). Under this compromise, states were given a definite entitlement to desert lands, but to avoid speculation and misdealing, the federal government would retain title until the states had met the conditions of the Carey Act, and actually reclaimed desert lands. Giving unfettered discretion to the Secretary to approve or disapprove of Carey Act applications would nullify the congressional promise to western land states included in the Carey Act. That such was not the intent of Congress is clear not only from the Act's language, but also from the legislative history.

B. Congress intended the Carey Act to be a conditional grant to western states.

The legislative history of the Carey Act demonstrates that the congressmen understood that the states were given a conditional grant of land, with title to pass upon reclamation of the land by actual settlers. The report of the Secretary of Interior on the Senate bill notes that "the United States retains title until reclamation is accomplished and land occupied by actual settlers. This, if successful, is the great object to be obtained; and if unsuccessful the United States still holds the unencumbered fee." 26 Cong. Rec. 8390 (August 10, 1894).

In the House debate, Mr. Pickler, sponsor of the legislation in the House, explained the bill as "a proposition to donate each of the states . . . a million acres of such lands." 26 Cong. Rec. 8391-92 (Aug. 10, 1894). He continued:

> "Now here is a proposition which costs the government nothing, but simply donates these lands to the states, leaving them to bear the burden of irrigation and reclamation. Furthermore, it is provided that the title to these lands shall not pass to the states until it is shown to the satisfaction of the Secretary of Interior that the lands had been reclaimed according to law and the money expended upon them." *Id.*

There is nothing in the legislative history supporting the view that once a state had identified desert lands and requested their temporary withdrawal or segregation, the Secretary could arbitrarily deny the request. The only reference to discretion on the part of the Secretary, upon which the government mistakenly relies, refers to the duty of the Secretary to assure compliance with provisions of

the Act upon which the grant is conditioned. Understandable, if a state did not comply with the provisions of the Act, the Secretary was under no obligation to transfer title. However, the language of the Act itself and its legislative history make clear that it was the intent of Congress that lands be patented by the Secretary just as fast as the lands could be irrigated and reclaimed in compliance with the Act. Duties of the Secretary of Interior were to be ministerial in nature for the purposes of determining whether the conditions of the Act had been met.

In *Payne v. Central Pacific R. Co.*, 255 U. S. 228 (1921), this Court was confronted with a similar issue involving the denial of an exchange under an Act granting New Mexico the right to select certain lands for the support of common schools. The government argued that so long as the selection was without the Secretary's actual approval, it gave no right as against the government. The Court held, however, that the selection was like "the concluding step of one who, by full compliance, has earned the right to receive the title." 255 U. S. at 234. Likewise, a state reclaiming desert lands in compliance with the Carey Act performs the concluding step entitling it to a patent to the lands. The Secretary cannot foreclose the state by arbitrarily denying the state's Carey Act application.

The cases cited by the government are inapposite, since they arose under statutes granting interests in lands once certain conditions had been complied with. In the case of the Carey Act, the power conferred upon the Secretary is ministerial or judicial in its nature. His only function under the Act is to ascertain that the specified

conditions have been met, at which time the Secretary is obliged to issue a patent.

Subsequent legislative enactments underscore this interpretation of the Carey Act. The Act of June 11, 1896, 43 U. S. C. § 642 (1970), which followed the enactment of the Carey Act by only 2 years provides as follows:

> Under any law heretofore or hereafter enacted by any state, providing for the reclamation of arid lands, *in pursuance of and acceptance of the terms of the grant made in § 641 of this title, . . .* (Emphasis added.)

New legislative enactments by Congress have not abrogated the entitlements of the western states under the Carey Act. Indeed, in the face of repeal of a great many homestead and land grant statutes under the Federal Land and Policy Management Act of 1976 (FLPMA), 43 U. S. C. § 1701-1782 (1970), the basic provisions of the Carey Act have been left intact. FLPMA provided the mechanics for processing Carey Act withdrawal claims and preserved state entitlements under the Act. The Congressional policy of assisting the states in the reclamation of desert lands contained in the Carey Act and preserved through the years should not now be disregarded by reversing the lower court's decision.

C. Case law supports the lower court's decision.

This Court has previously recognized that the Carey Act requires the United States to transfer desert lands to the states once the conditions of settlement and reclamation are satisfied. The Court explained as follows:

> By the Carey Act the United States binds itself to donate, grant, and patent to a state, complying

with stated conditions, desert lands which the state may cause to be irrigated, or claimed, or occupied. The state is required to file a map of the land proposed to be irrigated, showing the plan of irrigation, etc., and is authorized to make contracts to cause the land to be reclaimed, and to induce their settlement and cultivation. Upon satisfactory proof the Secretary of the Interior is directed to issue patents to the states or its assigns. *Idaho Irrigation Co. v. Gooding,* 265 U. S. 518, 521 (1923).

This interpretation of the Act was also adopted by a federal district court in Idaho in 1933. In *Twin Falls Land and Water Co. v. Twin Falls Canal Co.,* 7 F. Supp. 238 (D. Idaho 1933). the court stated:

> By its terms (the Carey Act) . . . the United States offered to grant to states complying with the requirements of the enactment, large bodies of desert land. This statutory offer was formally accepted by the State of Idaho which laid down an elaborate and carefully guarded method of procedure for persons desiring to construct such projects and for settlers thereon.

Statements by the Supreme Court of Montana in two early cases also demonstrate common understanding concerning the operation of the Carey Act:

In *State v. Wright,* 44 P. 89 (Mont. 1896), the Supreme Court of Montana stated:

> The United States had the power to make the offer to the state, to grant it the lands provided the states would reclaim them. Of this there can be no doubt. . . . We believe the acceptance is valid. . . . The attitude of the state thereby became that of an agent of the United States, to make effective the offer of the latter to part with its desert lands estate or its assigns, provided the states can reclaim such lands, and induce the actual settlement and cultivation thereof. This the state has undertaken to make possible by legislation. If the state fails, the United States will not issue its patents. If the state succeeds, the United States has agreed to pass the title to the state, or its assigns, upon satisfactory proofs of the fulfillment of the acts of Congress. 44 P. at 92.

Two years later, the same court stated:

> The general government has by law made to the state conditionally a magnificent donation of lands. It is of the highest importance that the legislature of the states should make provision by law for performing the conditions upon which the right of the people to acquire the lands thus donated depends. *State v. Marshall,* 52 P. 268, 270 (Mont. 1898).

Each of these judicial pronouncements recognized that the intent of the Act is to make a conditional grant of an important resource to the desert land states. Once a state has accepted the grant and implemented the procedures necessary to comply with the Act's requirement, the grant becomes clear and absolute, resulting in the issuance of a patent by the Secretary. On the other hand, no judicial precedent exists for the assertion by the government that the Secretary has absolute discretion to grant or deny an application by a state willing to comply with the Act's provisions.

D. There is no consistent administrative interpretation contrary to the lower court's decision.

The government cites one case on point in favor of its argument that administrative interpretation favors its view of the Carey Act. A decision by the Secretary of Interior in *State of Wyoming,* 36 Pub. Lands Dec. 399 (1908), stands for the limited proposition that public lands properly withdrawn prior to the filing of the state's

application under the Carey Act are not available to the state. However, it must first be noted such a decision must be carefully scrutinized. Such an administrative decision can in large part be self-serving, inasmuch as the Department has generally attempted to interpret the Carey Act consistent with its own land development policies.

In the second place, the decision cannot be reconciled with the plain language of the Carey Act and its legislative history. Administrative interpretation is entitled to deference only where statutes are reasonably susceptible to different constructions. Federal courts are not obligated to follow administrative decisions that are inconsistent with statutory mandates or that frustrate congressional intent. *E. g., Volkswagenwerk v. FMC,* 390 U. S. 261 (1968). This is especially true where, as here, reliance is placed on a single administrative decision in 1908.

It should also be noted that the *Wyoming* case does not stand for any of the following propositions advanced by the government in the instant case: (1) that the Secretary has discretion to deny Carey Act applications as to unwithdrawn lands, (2) that the states have no enforceable entitlements, or (3) that the Secretary may arbitrarily refuse to classify desert lands to make them available for Carey Act entry.

The government also cites *Yakima Development Co. v. Washington,* 34 Pub. Land Dec. 453 (1906), but this case is not on point. The Secretary determined that the proposed project was not feasible because (1) it lacked sufficient irrigation water and (2) the state wanted to join the project with a federal reclamation project. The decision thus stands merely for the proposition that a state's proposal which does not meet the requirements of the Carey Act may be denied by the Secretary. This case illustrates the only kind of discretion which the Secretary is granted under the Act; namely, administrative discretion to determine whether the statutory requirements of the Act have been met.

This interpretation is confirmed by regulations promulgated by the Secretary to implement the Act. The Carey Act Regulations, 37 Pub. Lands Dec. 624 (1909), contain no provisions indicating that the Secretary has unfettered discretion to deny a proper application under the Act. The regulations reiterate the provisions of the Act and specify in detail the information and materials which the states must provide to comply with the Act's requirements. The clear implication in the regulatory language is that the Secretary's only function is to assure proper submittals by the states that the land is desert land, and that the irrigation proposal is adequate to irrigate the land.

The government also argues that the lower court's decision is contrary to present public policy in that it will hamper the Secretary in managing the public lands. However, the district court specifically found that the Secretary could perform his duties under the Carey Act in a manner which was consistent with his duty to classify and deal with lands in the public interest. The court stated:

> . . . the state may not perfunctorily select acreage previously withdrawn for other purposes, such as in this case a withdrawal for stock driveways. The Secretary is under an obligation to preserve enough desert land suitable for Carey Act development to

> fulfill the states' right of entitlement, which the federal government must contract to donate to the state in accordance with the Act. To the extent the land has been withdrawn for other purposes by the Secretary and the state remains desirous of initiating a Carey Act development on such acreage, its remedy is to petition the Secretary to reclassify the lands suitable for Carey Act entry. The Secretary may not arbitrarily deny the state's application for reclassification, withdrawal and Carey Act segregation. . . . Such a construction of the Carey Act is consistent with 43 U. S. C. A. 315 f and its proviso empowering and directing the Secretary to classify the public lands as more valuable or suitable for certain purposes upon application by a qualified applicant.

Thus, there is no evidence of any freezing or burden on the use of public lands in the western states. The Department is entitled to proceed with all classification programs, and may proceed to make withdrawals and dispositions as required in the public interest. Rights may be granted under the Desert Land Act or the Federal Land Policy and Management Act. The only constraint upon the Secretary is that he must manage public lands to carry out the objectives of the Carey Act as well; namely, to preserve enough desert lands for appropriate applications according to provisions of the Act and consistent with the right of entitlement granted each state by Congress. When a state requests segregation of unwithdrawn public lands or requests reclassification of withdrawn lands, well established Department procedures and appropriate judicial review can resolve any conflicts with respect to the use of the public lands.

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IV.

CONCLUSION

The development of sprinkler irrigation systems and deep wells as a source of water have opened up the possibility of reclaiming and irrigating thousands of acres of hitherto unusable desert lands in the western states. Such a potential should not be foreclosed by allowing the Secretary unlimited discretion to deny proper applications under the Carey Act. The language of the Act, its legislative history and existing judicial precedent all demonstrate that Congress mandated certain duties on the part of the Secretary of Interior. Public lands are protected against speculation by the conditions imposed in the Act, but once those conditions are met the states have a clear entitlement to the lands that had been identified and reclaimed. The lower court's decision is consistent with this interpretation and should be affirmed.

Respectfully submitted,

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APPENDIX A

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